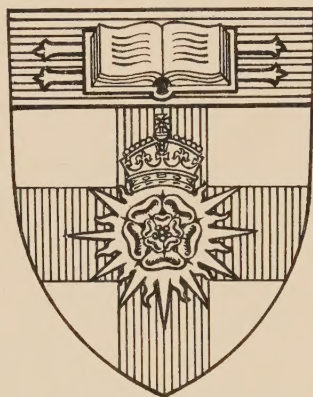


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ERRATA

P. 142, footnote 10. For “(1746) Willes 206 ” read “(1700) Willes 205.”

P. 157, five lines from bottom. For “Bowers, Covenants . . .” read “Behan,
“Covenants . . .”

P. 193, para. 4, line 1. For “In a footnote Atkinson . . .” read “In a
“footnote Atkyns . . .”

P. 200, footnote 3. For “B. & Ald.” read “B. & Ad.”

P. 538, footnote 2. For “ [1935] A.C. 442 ” read “ [1934] 2 K.B. 335.”

CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL

OWEN OWEN ESTATE LD. *v.* LIVETT AND OTHERS.

[1954 O. 2066.]

1955
May 11, 12.

Upjohn J.

Landlord and Tenant—Act of 1927—Improvement—Claim for compensation by tenant—Objection by landlord that improvement made “in pursuance of a contract”—Meaning of “contract”—Practice—Procedure for testing question—R.S.C., Ord. 54A, r. 1A—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), ss. 2 (1) (b), 3 (1).

The expression “contract” in section 2 (1) (b) of the Landlord and Tenant Act, 1927¹ (which provides that a tenant shall not

¹ Landlord and Tenant Act, 1927, s. 1: “(1) . . . a tenant . . . shall, “if a claim for the purpose is made “in the prescribed manner— . . . “be entitled, at the termination of “the tenancy, on quitting his holding, “to be paid by his landlord compensation in respect of any improvement . . . made by him . . . which “at the termination of the tenancy “adds to the letting value of the “holding: . . . (3) In the absence “of agreement between the parties, “all questions as to the right to compensation under this section, or as “to the amount thereof, shall be “determined by the tribunal herein “after mentioned . . .”

S. 2: “(1) A tenant shall not be “entitled to compensation . . . (b) “in respect of any improvement . . .

“which the tenant or his predecessors “in title were under an obligation to “make in pursuance of a contract “entered into . . . for valuable consideration, including a building “lease; . . .”

S. 3: “(1) Where a tenant of a “holding to which this Part of this “Act applies proposes to make an “improvement on his holding, he “shall serve on his landlord notice “of his intention to make such improvement . . . and if the landlord “ . . . serves on the tenant notice of “objection, the tenant may, in the “prescribed manner, apply to the “tribunal, and the tribunal may . . . “certify in the prescribed manner “that the improvement is a proper “improvement: . . .”

1955

OWEN OWEN
ESTATE LD.v.
LIVETT.

be entitled to compensation for any improvement made "in pursuance of a contract"), is to be interpreted literally, and is not restricted to a contract made between a landlord and a tenant.

The tenants of certain shop premises served on the landlords notice of a proposal to make improvements on the premises in the way of improved lavatory accommodation. The landlords served notice of objection, not on the merits, but on the ground that the tenants were under an obligation to make the said improvements pursuant to a covenant in a sublease which they had executed, and that such sublease was a "contract" within the meaning of the subsection.

The tenants applied by summons to the court as the tribunal under the Act for a certificate that the improvements were proper improvements for which they were entitled to be compensated on the expiration of their tenancy, and contended that a "contract" within the subsection was limited to one made between a landlord and a tenant or their successors in title:—

Held, that there was nothing in the context of the subsection to cut down the meaning of the perfectly general words there to be found, or to limit their literal interpretation; so that the covenant in the sublease was a contract within the meaning of the subsection, and the tenants were precluded from claiming compensation.

Held also, that as the dispute between the parties was one concerning the construction of the Act, the proceedings were not in proper form; and that a pro forma summons should be taken out under Ord. 54A, r. 1A.

ADJOURNED SUMMONS.

The plaintiffs were holders of a lease granted to their predecessors on October 7, 1901. It was for a term of 72 years from September 25, 1900, of certain premises known as 108, 109 and 110, High Holborn in the County of London. The rent reserved was £600 per annum. The lessors, the defendants, were the freeholders, and were the trustees of St. Clement Danes High Holborn Estate Charity.

The plaintiffs, on September 2, 1954, served upon the lessors pursuant to sections 1 (1) and 3 of the Landlord and Tenant Act, 1927, a notice of a proposal to make certain improvements on the premises, namely, the provision of additional and more convenient lavatory accommodation. No objection upon the merits of that proposal was taken by the lessors, who agreed that the improvements were proper and reasonable. On November 17, 1954, within the three months prescribed by the Act, the lessors gave notice of objection, on the ground that on September 23, 1954, the plaintiffs had granted a sublease of the premises to the Burnley Building Society and, by clause 3 (c) of that lease, had covenanted with the underlessees to instal the new lavatories which were the subject-matter of the notice to the freeholders.

The plaintiffs applied to the court, as the tribunal under section 63 of the Landlord and Tenant Act, 1954, to deal with matters arising under Part I of the Act of 1927 where the rateable value of the premises exceeded £500, for a certificate under section 3 (1) of the Act of 1927 that the improvements were proper.

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George Hesketh for the tenants. The question is whether "contract" in section 2 (1) (b) means any contract which the tenant has made, or whether it is restricted to a contract between the tenant and his landlord or between their predecessors in title. The purpose of the Act is to benefit the tenant and not the landlord, so that the latter and narrower construction is to be preferred: see the observations of Scrutton L.J. in *Simpson v. Charrington & Co. Ltd.*² The intention is that if the tenant makes an improvement he will get compensation when his lease expires, provided that he complies with the requisite procedural requirements.

[UPJOHN J. If the tenant makes an improvement pursuant to a contract with another party, such as a subtenant, he may be getting his quid pro quo twice over; once from the subtenant, and again from the landlord under the terms of the Act.]

Even so, the rent paid by the subtenant will be based on the footing that though the tenant has paid for the improvements he will be recouped by the landlord; so that, as a matter of negotiation, the tenant will not get a double advantage. The contention that the Act should be construed favourably to the tenant is supported by *Salmon v. Duncombe*³ and *Fowle v. Bell*⁴; those cases indicate that an Act must not be construed so as to defeat the manifest intention of Parliament unless the language positively requires such a construction.

The word "contract" occurs again in section 9, which forbids contracting out of the Act except for consideration considered adequate by the tribunal; that section can only refer to contracts between landlords and tenants [*Holt v. Lord Cadogan*⁵ was referred to], and the same word should not be construed differently in different sections of the same Act, having regard to the general purpose of that Act.

[UPJOHN J. In the absence of authority on the matter, I should not expect that "contract" in one section of an Act

² [1934] 1 K.B. 64, 69; 50 T.L.R. 46.

⁴ [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.

³ (1886) 11 App.Cas. 627.

⁵ (1930) 46 T.L.R. 271.

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necessarily has the same meaning as it has in another section; that certainly would not be the case in a taxing Act.]

C. F. Fletcher-Cooke for the landlords. It is plain that the language of section 2 (1) (b) is apt to cover the sublease in this case. There is no compelling necessity to read into the Act a restriction which is not there; there is no context which requires such a restriction. The whole purpose of the Act is to prevent the tenant from suffering a detriment; not to prevent the landlord from obtaining a windfall. Before the Act of 1927, if the tenants were under a contractual duty to make the improvements, they could not have demanded any recoupment from the landlords. If the tenants' construction were right, they could get compensation twice; they could rack-rent the subtenant and also recoup themselves from the landlords at the end of the lease. The court will not favour a construction such as that.

On the point taken under section 9, it cannot be said that "contract" has been specially defined in that section simply because in the working out of the section only one form of contract appears to be applicable. In any event, the construction of a word in one section is not conclusive as to the construction of the word elsewhere in an Act.

UPJOHN J. This summons raises an interesting question of construction of section 2 of the Landlord and Tenant Act, 1927. Shortly put, section 1 of that Act entitles the tenant in certain cases to make a claim for compensation for improvements made by him to his holding during the currency of his tenancy. Section 2 limits the tenant's right to compensation in certain cases and the real question I have to consider is whether, having regard to subsection (1) (b) of that section, the tenant's claim is excluded in this case.

Section 3 of the Act provides for the machinery where an improvement is contemplated, and, putting it shortly, subsection (1) provides that a tenant proposing to make an improvement must serve on his landlord notice of intention to do so with plans and so forth. Within three months the landlord may object and serve a notice of objection. If he does so, then the matter goes before the tribunal. The tribunal, where the rateable value of the premises, as in this case, exceeds £500 per annum, is, by operation of section 63 of the Landlord and Tenant Act, 1954, the High Court. The tribunal has to consider the matter, and if it is satisfied that the improvement is a reasonable and suitable

one, it may issue a certificate and thereupon the tenant may execute the improvement.

[His Lordship stated the facts, read section 2 of the Act of 1927, and continued:] Then, as I have already said, section 3 sets out the machinery where the tenant is proposing to make an improvement. Where a certificate is granted then it is common ground that no immediate right to compensation arises. The compensation is only assessable and payable in accordance with section 1 of the Act upon the expiry of the lease, which in this case would be in the year 1972.

There is, I think, only one other section to which I need refer, which is section 9. The marginal note reads thus: "Restriction on contracting out." The body of the section is this: "This Part of this Act shall apply notwithstanding any contract to the contrary, being a contract made at any time after the 8th day of February, 1927: Provided that, if on the hearing of a claim or application under this Part of this Act it appears to the tribunal that a contract made after such date as aforesaid, so far as it deprives any person of any right under this Part of this Act, was made for adequate consideration, the tribunal shall in determining the matter give effect thereto."

The real point that I have to consider is whether the sublease to the Burnley Building Society is a contract for the purposes of section 2 (1) (b), which renders it impossible for the tenant to make any claim to compensation. Prima facie, there is no doubt that the words are wide enough to include and cover such an underlease. The underlease plainly put the plaintiffs under an obligation to make an improvement, and therefore it was an improvement which the tenant was under an obligation to make in pursuance of a contract entered into for valuable consideration.

However, it is argued that that is not the meaning to be put upon the words in this case, because, as Mr. Hesketh, for the plaintiffs, has rightly pointed out, the object of the Act was primarily to benefit the tenant and not the landlord. It was so put by Scrutton L.J. in *Simpson v. Charrington & Co. Ltd.*¹; he said²: "Before its passing"—that is the Act—"there was strong feeling among tenants that if during their tenancy they had made at their own expense improvements in the leased property, which rendered the premises more valuable, or had built up a business in the premises, which rendered them more valuable for a trade by reason of the probability that customers would

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¹ [1934] 1 K.B. 64.² Ibid. 69.

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“ continue to resort to the old premises, it was inequitable that
“ those two elements of value should pass to the landlord at the
“ end of the tenancy without compensation to the tenant who
“ had created them. Parliament appears to have thought it
“ desirable to remedy what it considered this lack of equity.”

Therefore, Mr. Hesketh submits that the Act should be construed in a manner favourable to the tenant and, although the words are capable of the wider construction which I have mentioned, that in the circumstances the expression “ contract ” should be limited to a contract entered into between the landlord and his successors on the one hand and the tenant and his successors on the other hand. It is submitted that if the words are read in the wider way, the benefit which the Act intended to confer upon the tenant will be largely defeated, and it was therefore suggested that I ought to restrict the meaning in the way I have mentioned.

In further support of giving such a beneficial construction to the Act I was referred to two cases, *Salmon v. Duncombe*³ and *Fowle v. Bell*.⁴ But every case depends upon the proper interpretation of the relevant Act, and I do not derive any great assistance from those authorities. They plainly, however, justify the court in approaching the construction of such a statute as this in a manner favourable to the tenant.

Mr. Hesketh also submitted that the word “ contract ” in section 9 plainly referred only to a contract between the tenant and the landlords, including any superior landlords or subtenants. That may be so, but I think it undesirable that I should express any view upon that. Assuming it to be so, nevertheless it does not, in my judgment, assist me in coming to a conclusion as to the meaning of the word “ contract ” in section 2, for the context is entirely different.

I return, then, to that section and I find myself unable to cut down the meaning of the perfectly general words there to be found. It may be, in such a case as I have before me, that the effect of the section is to deprive the tenant of part of the benefit of the improvements; because, although he may be in a position to obtain from the subtenant valuable consideration as recompense for the improvements, that will be only for the term of the subtenancy. It may be that the effect is to deprive the tenant of compensation for his improvement in so far as it will enure for the benefit of the reversioner, the landlord. But I

³ (1886) 11 App.Cas. 627.

⁴ [1947] K.B. 242.

find it impossible to give other than a literal interpretation to the words of the subsection; and, in my judgment, they are apt to include such a contract as has been entered into with the Burnley Building Society, which will therefore preclude the tenant from making any claim to compensation upon the conclusion of the lease in the year 1972.

The matter came before me in the form of a summons to be dealt with by the High Court acting as the appointed tribunal, and asked for the issue of a certificate. I do not think that that is the right way of dealing with this problem. No objection has been taken to it, as the parties desire to have their rights ascertained at once. I think, however, that this is not really in substance an application to the tribunal to consider the merits of the proposed improvement. It should really have taken the form of an originating summons under Ord. 54A for the construction of the Act. Therefore, I will ask the plaintiffs to issue a pro forma summons under Ord. 54A, r. 1A, asking for the construction of section 2, and I shall answer the question in this sense, that the tenants are not, in the events which have happened, entitled to compensation for the proposed improvements, being the improvements set out in the notice of September 2, 1954.

Order accordingly.

Solicitors: *Kimber Bull & Co.; Woolley, Tyler & Bury.*

F. R. D.

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[1954 W. No. 2299.]

Husband and Wife—Property—Matrimonial home—Desertion by husband—Mortgage—Equitable mortgage by husband—Occupation by deserted wife—Desertion prior to mortgage—Wife's interest an equity not an equitable interest or estate—Subject to claim by mortgagee without notice—Constructive notice not imputed to mortgagee.

By a legal charge created in 1939 a husband mortgaged to an insurance company a freehold house which was then the matrimonial home. In September, 1948, he paid off the charge by an advance from his bank, and by a charge dated November 10, 1948, he created an equitable mortgage of the house in favour of the bank to secure his overdraft. About September 2, 1948, he had deserted his wife, but the bank was unaware of this until evidence was filed

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in the present proceedings. In 1951 the wife obtained an order from the county court (which was upheld by the Court of Appeal) restraining the husband from ejecting her from the matrimonial home until he had provided other suitable accommodation.

The bank took out an originating summons for enforcement of the equitable mortgage against the husband and for an order for possession against the wife. The husband did not appear to argue the summons, and it was contended for the wife that the desertion being prior in time to the bank's mortgage she had an equity which entitled her to remain in possession of the house. The bank contended: (1) that it was subrogated to the prior legal mortgage of the insurance company, and (2) that the wife did not have an equitable interest which entitled her to possession:—

Held, (1) that there were no grounds for treating the bank as subrogated to the insurance company.

(2) That the wife's right to remain in possession was not a mere personal right as between her husband and herself; but constituted an equity in the premises enforceable against a purchaser for value with notice, but not an equitable estate or interest enforceable against a subsequent purchaser of an equitable estate for value without notice.

Street v. Denham [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532 and *Phillips v. Phillips* (1862) 4 De G.F. & J. 208 applied.

Bendall v. McWhirter [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 considered.

(3) That the bank did not have express, nor, in the circumstances, constructive notice of the wife's equity, and was entitled to an order for possession against her.

Per curiam: It would have been entirely unreasonable for the bank to inquire of the wife whether she had been deserted. The law does not require an intending purchaser or mortgagee, who has no reason to believe that a wife is deserted, to make any inquiry upon the footing that it is conceivably possible that she may be. In a normal mortgage transaction, where a proposing lender has reasonable grounds for believing that an intending mortgagor husband is in occupation of the security offered, he is entitled to assume that a normal relationship exists as between husband and wife, and is under no obligation to make any inquiry relating to their domestic relationship.

ADJOURNED SUMMONS.

The Westminster Bank Ltd. brought this summons in order to enforce an equitable mortgage dated November 10, 1948, over certain premises known as "Timberscombe," Shaws Hill, Whatstandwell, in the County of Derby. The first defendant was the mortgagor (hereinafter referred to as "the husband"), and it was not disputed that as against him the bank was entitled to the usual order to enforce a mortgagee's charge; but the bank also asked for an order for possession against the second defendant, who was the deserted wife of the husband.

The defendants were married in 1937, and at the time of the marriage the site on which the house "Timberscombe" now stood was purchased by the husband's father and by his direction conveyed into the husband's name. Subsequently the father built the house on it and it became the matrimonial home in 1939. On September 20, 1939, the husband created a legal mortgage on the premises in favour of the Co-operative Insurance Society Ltd. to secure repayment of £495 then advanced to the husband. For some time before September, 1948, the husband had been a customer of the Belper branch of the plaintiff bank, and was in the habit of visiting that branch weekly to draw money for the wages of those employed by him in his business. On some of those occasions he had mentioned to the bank manager that he wanted to pay off the Co-operative mortgage by means of a bank overdraft and to deposit the title deeds of his house with the bank to pay off that charge and as security for further overdraft facilities. This was ultimately agreed on or about September 2, 1948.

On September 9, 1948, the husband was permitted to start overdrawing on the strength of an undertaking then given by his solicitors that they would obtain and deposit the title deeds with the bank. On September 10, 1948, the husband drew a cheque for £550 on his banking account, thereby becoming overdrawn for the first time, and on September 16, he drew a cheque for £357 3s. in favour of the Co-operative Insurance Society for the purpose of paying off the mortgage. On October 25, the society endorsed a vacating receipt on the mortgage, and on November 9, 1948, the title deeds were deposited with the bank, the equitable charge being dated the next day, November 10, 1948. By this time the account was overdrawn to the extent of £1,346.

In the meantime the husband had deserted his wife on or about September 2, 1948. The latter took proceedings for maintenance in the Belper magistrates' court, and on October 14, 1948, obtained an order stating (*inter alia*) that she had been deserted. Until evidence was filed in these proceedings the bank was unaware that the husband had left home as early as September, 1948. The first intimation which the bank had of any change of address was the receipt on December 7, 1948, of an unsigned memorandum on the husband's business notepaper asking the bank to address all letters to a new address at Matlock-Bath "as I have left Shaws Hill for a period." The reference to

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Shaws Hill was, it appeared, a reference to his home address and not his business address.

Upon the wife's application to the county court, Judge Willes on October 24, 1951, made an order permitting her to reside in the house "Timberscombe" unless and until the husband should have first provided suitable accommodation, and restraining him by sale or assignment from evicting his wife from the matrimonial home. That case went to the Court of Appeal, who affirmed the decision, and was reported as *Lee v. Lee*¹ in a note to *Bendall v. McWhirter*.² At the date of the issue of the summons in 1954 some £1,673 was due from the husband, the amount due having since increased slightly.

John Mills for the plaintiffs, Westminster Bank Ltd. The bank's claim to enforce the mortgage rests on two grounds: (1) that it is subrogated to the rights of the building society, and (2) that the wife has no equity, and, therefore, no status which entitles her to take precedence of the bank as mortgagee. If the bank steps into the shoes of the building society, its rights are prior in time to the desertion, and its claim would come within the decisions in *Lloyds Bank Ltd. v. O*—(*Trustee of the Property of*), *A Bankrupt*³ and *Barclays Bank Ltd. v. Bird*.⁴ The bank is entitled on the evidence to be put in the position of the society as first mortgagee; it was clearly the intention of the parties that the bank should advance the money in order to pay off the first mortgagee and itself to have the first mortgage. *Whiteley v. Delaney*,⁵ although not exactly a case of subrogation, bears the greatest similarity of any case to the present. It is relied on in support of this claim; this is in fact an a fortiori case.

The wife has no legal or equitable interest of any kind against the property, although it is admitted that she has a right as against the husband to remain in the house, but that is a personal right against him plus something else, and the question is how far plus. In none of the cases has the right of a deserted wife been held to extend to a purchaser for value without notice. The cases start with *Thompson v. Earthy*,⁶ where Roxburgh J. held that a deserted wife had no legal or equitable interest in the land and that her rights could not prevail against a purchaser

¹ [1952] 2 Q.B. 489n.; [1952] 1 T.L.R. 968; [1952] 1 All E.R. 1299.

² [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

³ [1953] 1 W.L.R. 1460; sub nom. *Lloyds Bank v. Oliver's Trustee* [1953] 2 All E.R. 1443.

⁴ [1954] Ch. 274; [1954] 1 All E.R. 449.

⁵ [1914] A.C. 132.

⁶ [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.

who had proved her title. This principle has since been whittled down.

In *Woodcock (Jess B.) & Sons Ltd. v. Hobbs*⁷ Denning L.J. said that there was no doubt that the wife's right to remain in possession of the matrimonial home was an equity. So far, that right has only been asserted against the husband's trustee in bankruptcy, or the husband's mistress, or the husband's brother-in-law who purchased the property with full knowledge of the wife's position: see *Bendall v. McWhirter*,⁸ *Street v. Denham*⁹ and *Ferris v. Weaven*.¹⁰ None of these cases overruled *Thompson v. Earthy*,¹¹ and the only case in which it has been questioned is *Errington v. Errington*,¹² and then only on the equity point. In *Bradley-Hole v. Cusen*¹³ Jenkins L.J. explained that the decision in *Bendall v. McWhirter*¹⁴ depended on the personal relationship between husband and wife and that the husband's trustees took the property subject to the husband's obligations.

There are thus three cases on each side of the line: three in which the wife won, *Bendall v. McWhirter*,¹⁴ *Ferris v. Weaven*¹⁵ and *Street v. Denham*¹⁶; and three in which she lost, *Thompson v. Earthy*,¹⁷ *Barclays Bank Ltd. v. Bird*¹⁸ and *Lloyds Bank Ltd. v. O—— (Trustee of the Property of), A Bankrupt*.¹⁹ The question was left open in *Woodcock v. Hobbs*²⁰ as it went off on another point. The court must decide where the line lies. The right view is that the wife's right is a purely personal one between the husband and wife: *Thompson v. Earthy*²¹ and *Bradley-Hole v. Cusen*,²² per Jenkins L.J.

If the wife had an equity it would date from the time of the desertion, and bind all except a purchaser for value without notice as if it were an equitable interest. The judgments of Denning L.J. in *Bendall v. McWhirter*²³ and *Woodcock v. Hobbs*²⁴ show the extent of such an equity; and the wife's right to remain in possession is always at the discretion of the court. It has never

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⁷ [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

⁸ [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

⁹ [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.

¹⁰ [1952] 2 All E.R. 233; [1952] W.N. 318.

¹¹ [1951] 2 K.B. 596.

¹² [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

¹³ [1953] 1 Q.B. 300, 306; sub nom. *Hole v. Cusen* [1953] 1 All E.R. 87.

¹⁴ [1952] 2 Q.B. 466.

¹⁵ [1952] 2 All E.R. 233.

¹⁶ [1954] 1 W.L.R. 624.

¹⁷ [1951] 2 K.B. 596.

¹⁸ [1954] Ch. 274.

¹⁹ [1953] 1 W.L.R. 1460.

²⁰ [1955] 1 W.L.R. 152.

²¹ [1951] 2 K.B. 596.

²² [1953] 1 Q.B. 300.

²³ [1952] 2 Q.B. 466.

²⁴ [1955] 1 W.L.R. 152.

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been held to be an absolute right, and it can only be binding on a purchaser who has at least express knowledge, or possibly one who has recklessly disregarded an intimation. [*Dudley and District Benefit Building Society v. Emerson* ²⁵ was referred to.]

To summarize, the bank asks for a declaration that the wife has no status against it as mortgagee and for an order against her after 28 days. If the wife has an equity, then *Woodcock v. Hobbs* ²⁶ is relied on and the court is asked not to allow any greater time than was granted in that case.

Peter Foster for the wife. The bank, which is an equitable mortgagee, is not entitled by subrogation to the rights of the building society under their legal mortgage. There was no intention by the parties that the bank, by allowing the husband to overdraw to pay off the first mortgage, should take over the rights under that mortgage; there was a gap of time between the vacation of the old mortgage and the creation of the new mortgage. There was nothing wrong in this transaction, and this case is quite different from *Whiteley v. Delaney*, ²⁷ where the mortgagor deliberately omitted to disclose the existence of a second mortgage.

As a result of a number of cases it has been held that the wife has a special right to remain in the matrimonial home. *Lloyds Bank Ltd. v. O—— (Trustee of the Property of), A Bankrupt* ²⁸ and *Barclays Bank Ltd. v. Bird* ²⁹ are distinguishable; in those cases the mortgages were prior in time to the desertion, and the mortgage was in the first case a legal mortgage and in the second there was a right to have a legal mortgage executed.

In *Bendall v. McWhirter* ³⁰ Denning L.J. came to the conclusion that the wife's right to remain in the matrimonial home was an equity. In *Street v. Denham* ³¹ Lynskey J. felt obliged to hold that a deserted wife had a special right enforceable not only against her husband but against his successors in title, including a purchaser for value who bought with knowledge of the facts. The wife's right, therefore, rests on some sort of equitable or legal basis beyond a purely personal one as against her husband. If that be so, there is no reason why her rights should not prevail against the equitable mortgagee, who was after all aware of her occupation.

[UPJOHN J. There is all the difference between an equitable

²⁵ [1949] Ch. 707, 715; 65 T.L.R. 444; [1949] 2 All E.R. 252.

²⁶ [1955] 1 W.L.R. 152.

²⁷ [1914] A.C. 132.

²⁸ [1953] 1 W.L.R. 1460.

²⁹ [1954] Ch. 274.

³⁰ [1952] 2 Q.B. 466.

³¹ [1954] 1 W.L.R. 624.

right enforceable against the land and an equity which arises under a contract.]

In *Bendall v. McWhirter*³² Denning L.J. held that the wife had an equity which was enforceable against the husband's trustee in bankruptcy. Romer L.J.³³ considered that it was a licence subject to which the trustee took the property. The husband is prevented by an order of the court from ejecting the wife unless he finds her other accommodation; she has therefore an irrevocable licence, which a court of equity would enforce by injunction: *Millennium Productions Ltd. v. Winter Garden Theatre (London) Ltd.*³⁴ It is the settled practice of the court to preserve the sanctity of a bargain by injunction: see the same case in the House of Lords, sub nom. *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*,³⁵ and *Foster v. Robinson*.³⁶

In *Errington v. Errington*³⁷ Denning L.J. said that a deserted wife was a licensee who could only be turned out of the matrimonial home by her husband under an order of the court. If, therefore, the court will grant an injunction to restrain a licensor from revoking his licence, it is not a great step to say that what the licensee gets is an equitable interest. In *Bendall v. McWhirter*³⁸ Denning L.J. said that a contractual licensee has an interest valid if not at law at any rate in equity against the successors in title of the licensor; that it was a clog or fetter like a lien: see also *Lee v. Lee*.³⁹ If the court applies here the principle enunciated by Denning L.J., that is an end of the matter.

[UPJOHN J. If I did, would I not be going against the majority of the Court of Appeal in *Bendall v. McWhirter*⁴⁰? Romer L.J. did not so describe the wife's interest, and Somervell L.J. concurred.]

There is now a considerable body of authority that the wife has an equitable interest.

In *Woodcock v. Hobbs*⁴¹ it was said that a purchaser with notice was in no better position than the husband. Possession by a tenant is notice to a purchaser of the actual interest he may have. Thus the occupation by the wife constituted notice to the bank of her interest: *Daniels v. Davison*⁴²; see also *Nisbet and*

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³² [1952] 2 Q.B. 466.

³³ *Ibid.* 485-7.

³⁴ [1946] W.N. 151; [1946] 1 All E.R. 678.

³⁵ [1948] A.C. 173, 202; 63 T.L.R. 529; [1947] 2 All E.R. 331.

³⁶ [1951] 1 K.B. 149, 156; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.

³⁷ [1952] 1 K.B. 290.

³⁸ [1952] 2 Q.B. 466.

³⁹ [1952] 2 Q.B. 489n.

⁴⁰ [1952] 2 Q.B. 466.

⁴¹ [1955] 1 W.L.R. 152.

⁴² (1809) 16 Ves. 249.

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*Potts' Contract*⁴³ and Williams on Vendor and Purchaser, 4th ed., vol. 1, p. 636. If, therefore, the wife has an interest, the court has no discretion.

[UPJOHN J. I should have thought that that was right, but the Court of Appeal has said that it was otherwise in *Woodcock v. Hobbs*.⁴⁴]

The court has a discretion whether or not to exercise an equitable remedy. The court has jurisdiction to order a sale, but the right order here would be for foreclosure.

[UPJOHN J. It does not make any difference to you whether it is foreclosure or sale; in either case you have to go out of possession.]

Foreclosure allows six months and it is at the end of the foreclosure that the wife's rights arise; it is only then that the position under *Woodcock v. Hobbs*⁴⁴ has to be considered. It is a question of buying time. The position has, of course, changed since *Wallis v. Griffiths*,⁴⁵ and on the rules a mortgagee can ask for possession without foreclosure or sale; but the proper remedy of an equitable mortgagee is foreclosure, not sale. The court has a discretion to order a sale, but there should be special circumstances: see Coote on Mortgages, 9th ed., vol. 2, p. 1071, and *Heath v. Crealock*.⁴⁶

The onus is on the plaintiff to show that there are special circumstances justifying a sale, and that has not been done here; and the court will not make an order for sale without evidence of value: statement of North J. arguendo in *Smithett v. Hesketh*.⁴⁷ It is admitted that 99 orders out of 100 today are for a sale, but the onus lies on the mortgagee to show what are the special circumstances, otherwise foreclosure is the proper remedy. As to the form of order on foreclosure, see Seton's Judgments and Orders, 7th ed., vol. 3, p. 1973.

Alternatively, if *Woodcock v. Hobbs*⁴⁸ applies now, the three months given in that case are a yardstick on the facts of that case, and in the present case the court is asked to grant some sort of tenancy or at least a much greater period than in *Woodcock v. Hobbs*.⁴⁸

Mills in reply. The licence remains the same sort of licence as it always was and it is not suggested that it can be revoked; the question is whether the house can get into the hands of some-

⁴³ [1905] 1 Ch. 391; 21 T.L.R. 261.

⁴⁴ [1955] 1 W.L.R. 152.

⁴⁵ [1921] 2 Ch. 301.

⁴⁶ (1874) L.R. 10 Ch. 22.

⁴⁷ (1890) 44 Ch.D. 161, 163.

⁴⁸ [1955] 1 W.L.R. 152.

one who is not subject to the licence: see *Wright v. Dean*.⁴⁹ Although a licence may be irrevocable, that does not mean that it is enforceable against the property, and it is a non sequitur to suggest that the licence is binding on the mortgagee because it is irrevocable by the husband. An injunction would be granted against the husband because the wife cannot get damages against him. Licences may become binding on third parties, but that is nothing to do with equities.

The wife's rights have been referred to as an extension of contractual rights, but against that the judgment of Parker L.J. in *Woodcock v. Hobbs*⁵⁰ is relied on where he said that he would have great difficulty in extending the wife's rights to purchasers with or without notice.

The court can, of course, restrain the husband from dealing with the house, and if an injunction had been granted before the mortgage the mortgagee would have been in a difficulty. But if one has an equitable mortgage granted in 1948 one does not suffer from an injunction granted years later: see *Barclays Bank Ltd. v. Bird*⁵¹ and the *Millennium* case.⁵²

The licence which has the protection of an injunction ties up with the equity question, and it really arises from the remedy which is available. To that extent it can be said that the wife has an equity which she did not have before. An equity does not merely mean something about which the court can use its discretion, but something which is binding on everyone except a bona fide purchaser for value.

The bank did not have constructive notice of the husband's desertion; it could not have inquired whether the wife had been deserted. The kind of things of which notice would be imputed if no inquiry is made is limited: *Hunt v. Luck*.⁵³

As to whether the order should be for foreclosure or sale, that should not be considered from the point of view of the wife, and sale is now regulated by statute. The wife suggests that she should be granted some sort of tenancy, but she had plenty of opportunity to ask for a tenancy and she did not do so. It is not in the mortgagee's interest to grant it now when she would become a controlled tenant.

Ian Campbell for the first defendant, the husband, did not appear to answer the summons, but appeared on the question of costs.

Cur. adv. vult.

⁴⁹ [1948] Ch. 686; 64 T.L.R. 467;
[1948] 2 All E.R. 415.

⁵⁰ [1955] 1 W.L.R. 152.

⁵¹ [1954] Ch. 274.

⁵² [1948] A.C. 173, 194, 202.

⁵³ [1901] 1 Ch. 45; 17 T.L.R. 3.

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July 6. UPJOHN J. having stated the facts read the following judgment: Mr. Mills for the bank advances two main points. He submits, first of all, that the bank is in effect subrogated to the rights of the Co-operative Insurance Society, and this would throw its rights as mortgagees back to a date anterior to the date of desertion and so bring it within the decisions of *Lloyds Bank Ltd. v. O*— (*Trustee of the Property of*), *A Bankrupt*,¹ and *Barclays Bank Ltd. v. Bird*.²

He relied on *Whiteley v. Delaney*³; but that was a very different case. It arose out of the failure of a solicitor to carry out a rather complicated sale and mortgage transaction in the manner intended, due entirely to the fact that the existence of a second mortgage was suppressed by the mortgagor; it was a case that depended entirely on its own facts. In this case there was nothing wrong whatever on the part of the husband in making the mortgage arrangements. The agreement which was made and carried out was that the earlier legal mortgage should be paid off and that a new equitable mortgage by way of deposit of title deeds should take its place; the husband paid off the earlier mortgage and his solicitors deposited the title deeds as they undertook to do. I can see no ground for treating the bank as having the rights of the Co-operative Insurance Society under their legal mortgage of 1939. In any event, the bank could only be so treated to the extent of the £357 paid to the society; but that is quite sufficient for the bank's purpose. Finally, I do not think that this point is open to the bank on the originating summons as at present drawn.

I turn, therefore, to Mr. Mills's second main point, namely, that the wife, though deserted before the date of the bank's mortgage, has no interest in the premises which can affect the bank's rights as mortgagees.

Mr. Mills does not seek an order for immediate possession against the wife, but asks for an order for accounts to be taken as against the husband and an order for sale with vacant possession three months after the date of the master's certificate certifying the amount due.

Of course, the court can order a sale in lieu of foreclosure at any time (see sections 90 and 91 of the Law of Property Act, 1925); but there must be some evidence that it would be proper, and there must be some evidence of value (see *per*

¹ [1953] 1 W.L.R. 1460; sub nom. *Lloyds Bank v. Oliver's Trustee* [1953] 2 All E.R. 1443.

² [1954] Ch. 274; [1954] 1 All E.R. 449.

³ [1914] A.C. 132.

North J. in *Smithett v. Hesketh*⁴). There is no such evidence before me, and I cannot today make any order for sale either immediately or upon the taking of the accounts. But, as pointed out by North J., my refusal to do so will not fetter any of the parties, who can always apply for a sale until foreclosure absolute.

Mr. Foster, for the wife, was constrained to concede that, since *Woodcock (Jess B.) & Sons Ltd. v. Hobbs*,⁵ a decision of the Court of Appeal, she has no right to stay on in the house indefinitely, but only until such time as the court in its discretion orders the wife to go out. He submitted, however, that, in exercising its discretion, the court will recognize that the wife has been deserted, and as such has an interest in the property taking priority over the bank's mortgage, and will therefore allow a substantial period after decree of foreclosure absolute before ordering her to deliver up possession. As a practical matter, therefore, the case lies in a narrow compass and it ultimately becomes a question of how long the wife will be allowed to stay in possession; but, if the wife can establish that she has some equity having priority over the mortgage, that will enable her to plead with some force for a longer period, by some months, than if she has no rights as against the mortgagee. That may be an important matter for the wife, and I must determine it.

The first question is whether the right of the deserted wife to occupation of the matrimonial home is purely personal between husband and wife, so that an assignee of the husband (other than a trustee in bankruptcy) taking even with notice would not be affected at all by any right of the wife against the husband himself to remain in possession, or whether such right constitutes an equity binding all but purchasers for value without notice. That point was left open by the majority of the Court of Appeal in *Bendall v. McWhirter*.⁶

In favour of the view that the right is purely personal is the decision of Roxburgh J. in *Thompson v. Earthy*,⁷ and the remarks of Jenkins L.J. in *Bradley-Hole v. Cusen*.⁸ In the later case of *Woodcock (Jess B.) & Sons Ltd. v. Hobbs*,⁹ Parker L.J.¹⁰ expressed great difficulty in extending the wife's right to possession against a purchaser with or without notice, and stated that

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⁴ (1890) 44 Ch.D. 161, 163.

⁵ [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

⁶ [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

⁷ [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.

⁸ [1953] 1 Q.B. 300, 306; sub nom. *Hole v. Cusen* [1953] 1 All E.R. 87.

⁹ [1955] 1 W.L.R. 152.

¹⁰ Ibid. 160.

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he would require further argument before determining the point.

Harman J. in *Barclays Bank Ltd. v. Bird*¹¹ plainly preferred this view. In the last three cases I have mentioned the remarks were obiter.

Against that view are the observations of Denning L.J. in *Bendall v. McWhirter*¹² and in *Woodcock (Jess B.) & Sons Ltd. v. Hobbs*,¹³ and I think it is fair to say that as I read the judgment of Birkett L.J. in the last case he did not dissent from the views of Denning L.J. These observations were again obiter.

In *Ferris v. Weaven*,¹⁴ a decision of Jones J., the ratio decidendi was that a purchaser with notice is bound by the wife's right to possession; but it is not a satisfactory authority for the proposition under discussion because, as Parker L.J. pointed out in *Woodcock v. Hobbs*¹⁵ and Harman J. in *Bird's* case,¹⁶ the decision could be justified on its own special facts.

In *Street v. Denham*,¹⁷ Lynskey J., against his own view, considered that he was bound to hold that a purchaser for value taking with notice was bound. It is true that in that case the plaintiff was the husband's mistress, but unlike *Ferris v. Weaven*¹⁸ the plaintiff appears to have paid the purchase-money, nor was the sale obviously collusive, as it plainly was in *Ferris v. Weaven*.¹⁸ Indeed, the husband appears to have behaved not unreasonably, being willing, at any rate at one stage, to provide alternative accommodation for the wife, which she refused.

My own view coincides closely with that of Harman J. in *Bird's* case,¹⁹ namely, that a deserted wife has no more than a status of irremovability by the husband; but, so far as this court is concerned, I think I ought to follow the decision of Lynskey J. on this point, as he carefully considered the matter and the earlier authorities, and accordingly to hold that a wife has an equity which is enforceable against purchasers taking with notice.

Now the bank's charge is equitable, and therefore it takes subject to all equities affecting the land whether it has notice of them or not, subject only to the following qualification. The Court of Equity has been careful to distinguish between two kinds of equities, first, an equity which creates an estate or interest in the land and, secondly, an equity which falls short of that. An

¹¹ [1954] Ch. 274.

¹² [1952] 2 Q.B. 466.

¹³ [1955] 1 W.L.R. 152.

¹⁴ [1952] 2 All E.R. 233; [1952] W.N. 318.

¹⁵ [1955] 1 W.L.R. 152.

¹⁶ [1954] Ch. 274.

¹⁷ [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.

¹⁸ [1952] 2 All E.R. 233.

¹⁹ [1954] Ch. 274.

equitable mortgagee takes subject to all prior equitable estates or interests in the land whether he has notice of them or not, but in relation to a mere equity it is otherwise; the defence of purchaser for value without notice may be available by the owner of an equitable estate against the owner of a prior equity. The principle was laid down by Lord Westbury L.C. sitting at first instance in *Phillips v. Phillips* ²⁰; as the relevant passages in his judgment are set out and followed in a subsequent judgment of a great master of equity, Fry J., in *Cave v. Cave*,²¹ I propose to go straight to that case.)

He said this ²²: “The case of *Phillips v. Phillips* ²³ is the one “which has been principally urged before me, and that, as being “the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord St. Leonards in his writings. That case seems to me to have laid “down this principle, that, as between equitable interests, the “defence will not prevail where the circumstances are such as “to require that this court should determine the priorities “between them. The classes of cases to which that defence “will apply are other than that. Lord Westbury in the course “of his judgment in that case said this ²⁴: ‘I take it to be a “‘clear proposition that every conveyance of an equitable interest “‘is an innocent conveyance, that is to say, the grant of a person “‘entitled merely in equity passes only that which he is justly “‘entitled to and no more. If, therefore, a person seised of an “‘equitable interest (the legal estate being outstanding), makes “‘an assurance by way of mortgage, or grants an annuity, and “‘afterwards conveys the whole estate to a purchaser, he can “‘grant to the purchaser that which he has, namely, the estate “‘subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. “‘Hence grantees and incumbrancers claiming in equity take “‘and are ranked according to the date of their securities, and “‘the maxim applies, “*Qui prior est tempore potior est jure*.” “‘The first grantee is potior—that is, potentior. He has a better “‘and superior—because a prior—equity.’ His Lordship then “proceeded to explain the different classes of cases in which that “defence is available, and the one which has been relied upon “as bringing the case of the defendants within the decision of “Lord Westbury is the third class, which is this, that (1) ‘where

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²⁰ (1862) 4 De G.F. & J. 208.²³ 4 De G.F. & J. 208.²¹ (1880) 15 Ch.D. 639.²⁴ Ibid. 215.²² Ibid. 646.

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“ ‘ there are circumstances that give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.’ ”

“ Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate? ” That is the question I have to determine.

In the subsequent case of *Cloutte v. Storey*,²⁵ Neville J.²⁶ treated an equitable estate and an equitable interest as equivalent terms.

The decision of the majority of the Court of Appeal in *Bendall v. McWhirter*²⁷ is clear. Romer L.J., with whom Somervell L.J. agreed, said²⁸: “ She has no legal or equitable interest in the home which she continues to occupy, and in that respect is in no better position than any other licensee.”

In the same case Denning L.J. was careful not to describe a deserted wife as having an equitable estate or interest in the land. He described it in these terms²⁹: “ the trustee in bankruptcy . . . takes therefore subject to her right, for it is an equity.” It is true that the Lord Justice compared the wife’s rights to that of a contractual licensee, whose rights in turn were described³⁰ as a “ clog or fetter like a lien.” A lien does not of necessity connote an interest in property, and I do not think Denning L.J. meant to suggest thereby that a deserted wife has an estate or interest in the land. If he did it was inconsistent with the view of the majority of the court. Moreover, the protection afforded to a contractual licensee, as *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*³¹ has made clear, does not depend upon the licensee having an estate or interest in the land, for normally at all events he will not, but upon the power of equity to restrain a breach of contract. See the judgment of Lord Greene M.R. in the Court of Appeal³² and the speech of Lord Uthwatt in the House of Lords.³³

In my judgment, the right of a deserted wife to remain in the matrimonial home, put at its highest, is a mere equity, and no equitable estate or interest in that home is created in her

²⁵ [1911] 1 Ch. 18.

²⁶ Ibid. 24.

²⁷ [1952] 2 Q.B. 466.

²⁸ Ibid. 485.

²⁹ Ibid. 484.

³⁰ Ibid. 483.

³¹ [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

³² [1946] 1 All E.R. 684, 685.

³³ [1948] A.C. 202.

favour upon desertion. Accordingly the bank, although only a subsequent equitable mortgagee, can, like the owner of a legal estate, if the facts warrant it, plead the defence of purchaser for value without notice; and to this question I now turn.]

It is not in dispute that the bank had no actual notice of the desertion before the execution of the charge, and the question is whether they had constructive notice by reason of the continued occupation of the matrimonial home by the wife as a deserted wife at the time of such execution.

Actual occupation of premises by a tenant or a stranger gives constructive notice of the rights of such tenant or stranger to a purchaser: *Hunt v. Luck*, a decision of Farwell J.,³⁴ affirmed in the Court of Appeal.³⁵ Section 3 of the Conveyancing Act, 1882, only codified the law.

In *Bendall v. McWhirter*³⁶ Denning L.J.³⁷ applied this doctrine without qualification to the case of a deserted wife. With all respect, I think his observations, which were obiter, went too far. In the first place, rightly or wrongly, the view is generally held in the profession that section 199 (1) (i) of the Law of Property Act, 1925, altered the law where the occupier enjoys possession of unregistered land by some instrument or matter capable of registration, for section 14 of the Law of Property Act only applied to Part I of that Act and not to section 199.

So far as this case is concerned, however, this point is academic, for I ignore the order of the magistrates in October, 1948, as it has not been argued that such order was capable of being registered and that failure to do so entitled the bank to be treated as being a purchaser for value without notice, though I express no opinion upon that point.

Secondly, in my judgment, this doctrine that notice of the rights of those in occupation will be imputed to a purchaser must be applied to the occupation of a deserted wife with great caution. The doctrine is only an illustration of the governing principle to be found now in section 199 (1) (ii) (a) of the Law of Property Act, 1925, replacing section 3 of the Act of 1882 with amendments, that the purchaser or mortgagee will be bound by constructive notice if knowledge of the particular matter (in this case desertion) would have come to his knowledge " . . . if such " inquiries and inspections had been made as ought reasonably " to have been made by him." That is the question to be answered, and each case must depend on its own facts.

³⁴ [1901] 1 Ch. 45; 17 T.L.R. 3.

³⁵ [1902] 1 Ch. 428; 18 T.L.R. 265.

³⁶ [1952] 2 Q.B. 466.

³⁷ *Ibid.* 483.

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Now the facts in this case are simple. Husband and wife lived at the matrimonial home together for nine years. In 1948 the husband had been a customer of the bank at any rate for some time and was in the habit of going to the bank weekly to draw wages. The bank had his home address on their books. So far as the evidence goes, all that continued throughout the time of the negotiations and execution of the mortgage. The bank had not the slightest reason to suspect that the husband had even left home until December, 1948, a month after the mortgage was executed.

In this state of affairs it would, in my judgment, be entirely unreasonable for the bank to send an officer to inquire, not whether a stranger was in occupation but to inquire of the wife whether she has been deserted. If it be a necessary or reasonable inquiry, nothing short of that will do, for mere discovery of the absence of the husband from home is no evidence of anything. In my judgment the law does not require an intending purchaser or mortgagee, who has no reason to believe that a wife is deserted, to make any inquiry upon the footing that it is conceivably possible that she may be; that is not a reasonable inquiry. If the law were otherwise it would mean that every intending purchaser or lender must inquire into the relationship of husband and wife and inquire into matters which are no concern of his and will bring thousands of business transactions into the area of domestic life and ties. That could not be right. In my judgment the law is this, that, where a man is carrying out a perfectly normal transaction of raising money upon mortgage and the proposing lender has reasonable grounds (as in this case) for believing that the intending mortgagor, the husband, is in occupation of the security offered, he is entitled to assume that a normal relationship exists as between husband and wife and is under no obligation to make any inquiry relating to their domestic relationship. On the other hand, if the intending mortgagee has notice of any fact which may put him on further inquiry as to whether the vendor has deserted his wife, or if having some suspicion, he wilfully abstains from inquiry to avoid notice, then the doctrine of constructive notice comes into play (see *per* Farwell J. in *Hunt v. Luck*³⁸).

Each case must be dealt with according to its own circumstances. For example, if before the mortgage was completed the bank had received the unsigned letter of December from

³⁸ [1901] 1 Ch. 52.

the husband asking them to send all letters to a new address as he had left the old, it may well be (though I express no concluded view upon the point) that such a circumstance might have put the bank under the duty of making some further inquiry which would have disclosed the fact of desertion.

In the circumstances, however, in my judgment the bank had no reason to make any inquiry of the wife, and therefore is not affected by any constructive notice of the wife's rights. The bank's mortgage therefore takes priority over the wife's equity.

The bank is, in my judgment, therefore, entitled to an order for the usual accounts and inquiries in a foreclosure action. Against the wife the bank only seeks an order for possession three months after the master's certificate answering the accounts and inquiries if they obtain an order for sale, and they are plainly entitled to that.

Order accordingly.

Solicitors: *Alfred Bright & Sons; Field, Roscoe & Co.; Cunliffe & Airy for Walker, Terry & Wilson, Belper.*

I. G. R. M.

In re E. (AN INFANT).

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Infant—Custody—Order for access—Order to send child out of jurisdiction—Not ward of court—Jurisdiction—Canadian order giving custody to mother—Mother domiciled in England—Application by father, under Guardianship of Infants Acts, for child to spend holiday with him in Israel—Guardianship of Infants Acts, 1886 to 1925 (49 & 50 Vict. c. 27 to 15 & 16 Geo. 5, c. 45)—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 9—R.S.C., Ord. 54p.

Infant—Ward of court.

A Canadian infant was the subject-matter of an order of a Canadian court, which gave her to the custody of her mother with certain rights of access to the father. The father had consented to the child being taken to London with the mother (who was subsequently married to an Englishman and became domiciled in England).

In July, 1955, the father, who was stationed in Israel in the exercise of his profession, made an application to the court, under the Guardianship of Infants Acts, 1886 to 1925, to obtain an order on the mother allowing the child to spend a holiday with him in

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Israel. The application did not ask that the child should be made a ward of court:—

Held, dismissing the application, (1) that there was no jurisdiction under the Guardianship of Infants Acts to make the order sought; (2) that by reason of section 9 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949,¹ the court was not entitled to exercise its inherent powers in relation to an infant until the infant had been made a ward of court pursuant to the provisions of R.S.C., Ord. 54r.

ORIGINATING SUMMONS.

An application was made by originating summons under the Guardianship of Infants Acts, 1886 to 1925, by a Canadian father for an order to be made on the mother, to whom the custody of the child of the marriage had been given by order of a Canadian court, and who was now domiciled in England (having subsequently married an Englishman), to send the child out of the jurisdiction to spend a holiday with her father in Israel.

The proceedings were heard in chambers, but, as an important question of procedure arose, his Lordship adjourned the summons into open court for the delivery of his judgment.

G. Brian Parker for the applicant.

Charles Russell Q.C. and *C. H. Gage* for the respondents.

ROXBURGH J. I have decided to deliver my judgment in open court because the point that has arisen arises frequently and is of undoubted importance to the profession.

The point arises in this way: the infant is a Canadian infant and she is the subject-matter of an order of a Canadian court which gave her to the custody of her mother with certain rights of access to the father. She is now six and a half years old. There was no express provision in the Canadian order as to the infant leaving Canada, and I do not know—and it is not material to decide—whether or not it was permissible, under the law of Canada, to take the child out of the jurisdiction without an order. I think that it probably was permissible, but the father undoubtedly consented on certain terms to the child being taken to London with the mother, who subsequently remarried, and on this occasion married an Englishman. She is domiciled in England. The child is in London, and there is not the slightest

¹ Law Reform (Miscellaneous Provisions) Act, 1949, s. 9 (1): “ward of court except by virtue of
“an order to that effect made by the
“Subject to the provisions of this
“court.”
“section, no infant shall be made a

doubt that I have jurisdiction to deal with the child if my jurisdiction is properly invoked.

The object of this application is to obtain an order on the mother to allow the child to spend a holiday with the father in Israel, where he is stationed in the exercise of his profession. He is a serving officer attached to some United Nations organization.

The application is intitled solely "In the matter of the 'infant' and 'In the matter of the Guardianship of Infants 'Acts, 1886 to 1925,'" and, what is still more important, it does not ask that the infant should be made a ward of court. Therefore, it is plainly an application made under the Guardianship of Infants Acts and under no other jurisdiction, inherent or otherwise.

It is clear that under those Acts "the court," which sometimes means magistrates, sometimes a county court, and sometimes the High Court, may make such order as it may think fit regarding the custody of an infant and the right of access of either parent; but is this an application with regard to either of those matters? It certainly is not an application with regard to custody. If it is anything, it is an application in regard to the right of access; but there is no dispute as to the right of access; there are provisions in the Canadian order with regard to the right of access. True, they are somewhat vague, but there is no dispute that the father may have access to the child in any event for periods which no doubt could be agreed if the father were in England during the summer holidays; but the father is not in England, and does not want to come to England during the summer holidays. What he wants is some order authorizing the mother, or rather, because the mother is raising every possible objection, an order ordering her to let the child go out of the jurisdiction to Israel.

In my view such an order cannot be obtained under the Guardianship of Infants Acts, and that is the importance of this matter. First of all, I should hardly have thought that it could possibly be brought within the words "right of access" on any construction, because what is really in issue is not the right of access, but the country in which the infant is to be for the time being; in other words, whether she is to remain in London or to go to Israel. Secondly, a little regard to the normal practice of the courts would show how inconvenient any other construction would be. In this particular case the infant is a Canadian infant and therefore the normal considerations do not apply; but it is well known that the court practically never

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allows any English infant to leave the jurisdiction without undertakings by some person that the child shall be returned within the jurisdiction. Of course, the High Court has machinery which enables it to accept undertakings and to enforce them; but the words "in this Act" must have the same meaning whether the Act is being applied by the magistrates or by the county court or by the High Court, and neither the magistrates nor the county court have any machinery for accepting or enforcing undertakings. Therefore, I do not think that it is a mere accident that the powers conferred under the Guardianship of Infants Acts are less extensive than the powers which the Chancery Division of the High Court of Justice enjoys by virtue of its inherent jurisdiction over infants.

On the other hand, the inherent jurisdiction of the Court of Chancery is undoubtedly in a certain sense restricted by section 9 of the Law Reform (Miscellaneous Provisions) Act, 1949, because that section provides: "(1) Subject to the provisions of this section, no infant shall be made a ward of court except by 'virtue of an order to that effect made by the court.'" Now, that appears to me to involve this: that the court is not entitled to exercise its inherent powers in relation to infants until an order to that effect has been made by the court. When I say that, I am not forgetting that there are in the rules provisions under which an interlocutory order can be made before the hearing of the summons; but that is expressly provided for by the rules to which I will come presently. Apart from the rules, this provision seems to me to show plainly that the Court of Chancery can no longer exercise its inherent jurisdiction in relation to infants until it makes an order that the infant in question is to be a ward of court, because "'ward of court' has been defined 'to mean a person properly under the care of the guardian appointed by the court; but the term has been extended to 'infants brought under the authority of the court by an application to it on their behalf, though no guardian is appointed' (*Brown v. Collins*¹). The court becomes, in effect, the guardian 'of such an infant': *per* Kay L.J. in *In re Newton (Infants)*.² Therefore, when the Act says that no infant shall be made a ward of court except by virtue of an order to that effect made by the court, it seems to me that it is in effect saying that the court shall no longer exercise its inherent powers except in relation to a person who has been made a ward of court pursuant to section 9.

¹ (1883) 25 Ch.D. 56, 60.

² [1896] 1 Ch. 740, 745; 12 T.L.R. 151.

The way in which that has to be done is clearly defined by Ord. 54p, which is specifically applicable to proceedings under that Act. In my judgment, compliance with the rules relating to it is not a mere technicality, because, as a short study of the rules shows, it is essential that people should know at any moment whether a person is or is not a ward of court. Rule 1 says: "An application to make an infant a ward of court shall be "made to the Chancery Division either by originating summons, "or by an ordinary summons in any action in the Chancery "Division to which the infant is a party. The summons"—and this is important—"shall, in addition to any other relief sought, "ask specifically that the infant be made a ward of court."

The summons which is before me does not comply with that rule because it does not ask that the infant be made a ward of court, nor is it intitled, "In the matter of section 9" or "of "the Act of 1949." I think that that provision is intended to be and is important. The present position is that there is before me an action in the Chancery Division to which the infant is a party, because the infant is a party to the summons under the Guardianship of Infants Acts which is before me, and such a summons is, in my view, an action within the meaning of this order. So that it is possible for the father to take out an ordinary summons asking that the infant should be made a ward of court; but that is by the way. The summons as it is at present does not comply with Ord. 54p.

Then—and this is an important rule—"2. The summons shall "forthwith after issue"—and I have a grave doubt whether I could allow this particular summons to be amended having regard to those words, but in any case I have already decided that I do not think any time (and I think that very little money) would be saved by an amendment as distinct from the issue of an ordinary summons as provided by rule 1—"be produced by the applicant "at the office of the Chief Master . . . for recording in the "Register of Wards and shall be marked by the officer recording "the summons that it has been so produced and recorded." That is very important, because the infant becomes a ward at the moment of the issue of a properly designed summons; but "3. Unless within 21 days after its issue an appointment is "obtained for the hearing of the summons the infant shall cease "to be a ward of court at the expiration of the said period of "21 days. Upon an appointment being obtained as aforesaid "the infant shall continue to be a ward of court until the deter- "mination of the application. 4. If no appointment is obtained

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“within the said period of 21 days the applicant shall leave at
“the Chief Master’s office a notice in writing to that effect for
“recording in the Register of Wards.”

In my judgment, therefore, compliance with Ord. 54P is now necessary in order to enable the court to exercise its inherent powers over wards of court. This summons does not comply with Ord. 54P, and therefore the only jurisdiction that I have today is jurisdiction under the Guardianship of Infants Acts and, in my judgment, that Act does not empower me to authorize, still less to order, the mother to send the child or allow the child to be taken to Israel.

Application dismissed.

Solicitors: *George & George; Stanley Attenborough & Co.*

J. L. D.

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In re FLETCHER, A DEBTOR.

Ex parte FLETCHER v. OFFICIAL RECEIVER.

[No. 594, 1954.]

Evershed M.R.,
Hodson and
Romer L.JJ.

Bankruptcy—Bankruptcy Rules—Validity—Creditors’ resolution that debtor be not adjudged bankrupt—Application by official receiver for adjudication—Jurisdiction of court—Enactment that rules “in force . . . continue in force . . . and . . . have effect as if made “under this Act”—Subsequent new rule in identical terms—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 18 (1), 132, 168 (3)—Bankruptcy Rules, 1952 (S.I. 1952, No. 2113 (L.14)), r. 219. Statutory Instrument—Validity—Whether ultra vires.

A receiving order was made against a debtor. At an adjourned first meeting of creditors a resolution was passed that the debtor should not be adjudged bankrupt, but that the meeting should be further adjourned. The official receiver applied to the court under rule 219 of the Bankruptcy Rules, 1952, for an adjudication order, which was made. The debtor appealed, submitting that rule 219 went beyond the rule-making powers conferred by section 132 of the Bankruptcy Act, 1914, having regard to the proviso to subsection (1) that the rules should not extend the jurisdiction of the court:—

Held, that the power to adjudicate on application of the receiver, contained in rule 219 of the Rules of 1952, was derived from rule 192 of the Rules of 1886–90, which had been continued “in force” by section 168 (3) of the Act of 1914. Section 168 (3) was not confined to rules which would have necessarily been within the strict jurisdictional limits of the Act, but embraced rules de facto in force. It covered a rule such as rule 192, which had been for many years treated as valid by the courts. By section 168 (3), rule 192 was to be treated as if validly made under section 132 of that Act, and it followed that rule 219 of the Rules of 1952, being

in identical terms, must also be regarded as validly made under the same section. Accordingly, the order of adjudication was effective.

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APPEAL from an order of adjudication made by Mr. Registrar Cunliffe.

On August 18, 1954, a bankruptcy petition was presented against William Peel Fletcher on the ground that he had failed to comply with a bankruptcy notice served on him on May 8, 1954, in respect of a judgment debt for £12,334 17s. 10d. A receiving order was made on October 12, 1954. On November 5, 1954, the first meeting of creditors was held, at which a resolution that the debtor be adjudicated bankrupt was defeated and the creditors decided unanimously that the meeting be adjourned until January 1, 1955. On that date the following resolution was carried, that "the debtor be not adjudged bankrupt but that the meeting be adjourned for three months to enable such proceedings to be taken as may be advised after further consideration by counsel of the matters referred to at this meeting." On March 21, 1955, the official receiver gave to the debtor short notice of an application dated January 27, 1955, made pursuant to rule 219 of the Bankruptcy Rules, 1952,¹ stating that he would apply on March 29, 1955, for an order that the debtor be adjudicated bankrupt. By his application the official receiver reported to the court that 28 proofs of debt had been received at that date totalling £333,412 17s. 1d., but that the only tangible asset known to the official receiver was furniture valued at approximately £700. On April 1, 1955, Mr. Registrar Cunliffe ordered that the debtor be adjudicated bankrupt.

The debtor appealed, and submitted that rule 219 was ultra vires, having regard to the limitation on the rule-making powers in section 132 of the Bankruptcy Act, 1914, which was imposed by the proviso to subsection (1). The jurisdiction to adjudicate was, it was submitted, limited to the circumstances envisaged by sections 14, 16 and 18 of the Act of 1914.²

¹ Bankruptcy Rules, 1952 (S.I. 1952, No. 2113), r. 219: "Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof, the court may, on the application of the official receiver or of any person interested, adjudge the debtor bankrupt."

² Bankruptcy Act, 1914, s. 14: (1) Where a receiving order is made

"against a debtor, he shall . . . submit to the official receiver a statement of . . . his affairs . . . (3) If the debtor fails without reasonable excuse to comply with the requirements of this section, the court may, on the application of the official receiver, or of any creditor, adjudge him bankrupt."

S. 16: "(16) If default is made in payment of any instalment due in

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Cyril Salmon Q.C. and R. O. C. Stable for the debtor. By section 132 (1) of the Bankruptcy Act, 1914, the rule-making powers conferred on the Lord Chancellor are expressed to be for the purpose of carrying into effect the objects of the Act and, by the proviso to that subsection, they must not extend the jurisdiction of the court. The relevant objects for present purposes are set out in section 18 and the powers of the court to adjudicate a debtor bankrupt are limited to the four circumstances there stated (the powers stated in sections 14 (3) and 16 (16) not being in point here). Only by distorting the language of that section can it be said that if the creditors pass a resolution that the debtor shall not be adjudged bankrupt they have passed no resolution so as to bring the case within the scope of section 18. Rule 219 seeks to extend the jurisdiction of the court to a fifth and different case and is, therefore, *ultra vires*. Rule 219 is a re-enactment of an earlier rule made under identical statutory provisions and has not been challenged in the courts, but however inconvenient the result of deciding that it is *ultra vires* may now be, the language of the provision is plain and unambiguous and such considerations are irrelevant. There are no authorities relevant on this point. The resolution not to adjudicate was not a nullity, for the creditors meet to decide what should be done, and it cannot be said that

"pursuance of the composition or
"scheme, or . . . that the composi-
"tion or scheme cannot . . . proceed
" . . . or that the approval of the
"court was obtained by fraud, the
"court may, if it thinks fit, on
"application by the official receiver
"or the trustee or by any creditor,
"adjudge the debtor bankrupt. . . ."

S. 18: "(1) Where a receiving
"order is made against a debtor,
"then, if the creditors at the first
"meeting or any adjournment thereof
"by ordinary resolution resolve that
"the debtor be adjudged bankrupt,
"or pass no resolution, or if the
"creditors do not meet, or if a
"composition or scheme is not
"approved in pursuance of this Act
"within 14 days after the conclusion
"of the examination of the debtor or
"such further time as the court may
"allow, the court shall adjudge the
"debtor bankrupt; and thereupon the
"property of the bankrupt shall
"become divisible among his creditors
"and shall vest in a trustee."

S. 132: "(1) The Lord Chancellor
"may, with the concurrence of the
"President of the Board of Trade,
"make general rules for carrying
"into effect the objects of this Act:
"Provided that the general rules so
"made shall not extend the jurisdic-
"tion of the court. (2) All general
"rules made under this section shall
"be laid before Parliament within
"three weeks after they are made if
"Parliament is then sitting, and, if
"Parliament is not then sitting,
"within three weeks after the begin-
"ning of the then next session of
"Parliament, and shall be judicially
"noticed, and shall have effect as if
"enacted by this Act."

S. 168: "(3) Until revoked or
"altered under the powers of this
"Act, any fees prescribed and any
"general rules and orders made
"under the Bankruptcy Acts, 1883
"to 1913 . . . which are in force at
"the commencement of this Act, shall
"continue in force, and shall have
"effect as if made under this Act."

they are to be precluded from deciding that the debtor is not to be adjudged bankrupt. The order to adjudicate is, therefore, ineffective.

Gilbert Beyfus Q.C. and *A. L. Figgis* for the official receiver. The purpose of the bankruptcy legislation is to effect an equitable distribution of the debtor's property amongst his creditors and to free him from the oppression of debts which he cannot pay. These objects may be frustrated if a person who has committed an act of bankruptcy cannot be adjudicated a bankrupt except on the grounds stated in section 18, for no distribution of the debtor's property can take place until he has been adjudicated a bankrupt. The Act of 1914 should be read against the background of the general scheme of bankruptcy legislation, which since 1869 has implied a power in the court, having regard to the purpose for which the bankruptcy court was set up, to adjudicate, subject only to the terms of the relevant statutes and to the rules made under them. Under the Act of 1869 the jurisdiction of the bankruptcy court arose, where an act of bankruptcy had been committed, as soon as a creditor petitioned for an adjudication order. In the Act of 1883 it was postponed until after a receiving order had been made and was made subject to the failure of the debtor to make a scheme of composition which was acceptable to his creditors and to the court. Once the matter is within its cognizance the court has the widest possible powers under the Act as a whole and under section 105.

It is a general principle of construction that if a literal construction of a statute is found on examination to frustrate the intention of the legislature or to produce an anomalous or insensible result, then, provided that the language is sufficiently flexible, the courts will lean towards a more liberal construction by which the intention is better effected: *Caledonian Railway Co. v. North British Railway Co.*³; *Ex parte Walton, In re Levy*.⁴ Rule 219 is designed to achieve the objects of the Act, but if the rule is invalid it will be possible in a case where the majority of creditors are friendly towards the debtor for him to abscond after filing a statement of his affairs. The receiving order would then have to remain in force indefinitely and the official receiver would be unable to deal with the property.

In *In re de la Porte*⁵ Cozens-Hardy M.R. said that the legislature did not consider it desirable that the receiving order should, in any circumstances, operate for a substantial period. The

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³ (1881) 6 App.Cas. 114, 122.

⁵ [1915] 1 H.B.R. 98.

⁴ (1881) 17 Ch.D. 746.

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receiving order stage was introduced in 1883 to give the debtor a short breathing space in which to offer a satisfactory composition to his creditors and the creditors an opportunity of accepting it, subject to the approval of the court. If the debtor is right the court will be unable to adjudicate even on the application of the debtor himself.

It is not, however, necessary now to rely on the contention that the court's jurisdiction is inherent or implicit in the Bankruptcy Acts, for over the years a well-established practice has grown up which is based on the assumption that the court has jurisdiction, and the court will seek, if it can fairly do so, to construe the Act in conformity with that practice: *Income Tax Special Purposes Commissioners v. Pemsel*,⁶ *Sobhuza II v. Miller*⁷ and *Rex v. Crewe (Earl)*⁸ (in which Vaughan Williams L.J. accepted a construction of a statute which complied with a well-established practice although it was inconsistent with the *prima facie* meaning of the language used). See also *Reg. v. Cutbush*.⁹

The old rule 192 (now rule 219) was considered and enforced in 1910 in *In re de la Porte*,¹⁰ and it was not then suggested that the rule was invalid. When the Bankruptcy Act, 1914, was passed Parliament must be taken to have been aware of the practice and to have impliedly approved it: *In re Barned's Banking Co. (Kellock's case)*,¹¹ in which a knowledge of bankruptcy practice was attributed to Parliament. In 1915 the rule was again considered by the court in *In re Silber*,¹² and again it was treated as being valid.

Section 168 (3) of the Act of 1914, although repealing the Act of 1883, gave statutory recognition for the immediate future to the then relevant rule, providing that it, and other rules made under the Acts of 1883 to 1913, should continue in force and have effect as if made under the Act of 1914 until revoked or altered by the Lord Chancellor or the Board of Trade. Parliament must, therefore, have taken the view then that the rule current at that time was *intra vires*, and must, further, have envisaged that future Lord Chancellors would have power to make a similar rule. If no further rules had been made, the point now taken that the rule is invalid would clearly not have been open. The rules now

⁶ [1891] A.C. 531, 590; 7 T.L.R. 657.

⁷ [1926] A.C. 518; 42 T.L.R. 446.

⁸ [1910] 2 K.B. 576; 26 T.L.R. 439.

⁹ (1867) L.R. 2 Q.B. 379, 382.

¹⁰ [1915] 1 H.B.R. 98.

¹¹ (1868) L.R. 3 Ch. 769, 781.

¹² [1915] 2 K.B. 317; [1915] 1 H.B.R. 95.

made are in precisely the same form as those continued in force and have the same force and efficacy.

The effect of a provision in a rule-making section that rules made thereunder, if laid before Parliament and approved, shall thereafter be given effect to as if they were contained in an Act of Parliament, has been considered in several cases, but there is no clear binding decision. The question was left open in *In re Dale*¹³ and in *In re Hann*.¹⁴ In *Institute of Patent Agents v. Lockwood*¹⁵ the House of Lords expressed the view that the rules there in question could not be challenged by the courts, but both Lord Herschell and Lord Watson pointed out that the views expressed by them on this point were not essential to the decision of that case. In that case the rule-making section contained a power to annul on resolution of either House of Parliament within 40 days of the laying before Parliament. In *Minister of Health v. The King*¹⁶ there were dicta to the contrary effect; but that case was dealing with an order made by the Minister of Health, not the making of general rules. *Lockwood's* case¹⁷ was followed in *Glasgow Insurance Committee v. Scottish Insurance Commissioners*¹⁸ (Lord Johnstone dissenting). These are not binding authorities, but the better view seems to be that when the regulations made under section 132 have been approved by Parliament they cannot be challenged in the courts, but of course the power to make regulations is limited to making regulations dealing with the exercise by the bankruptcy court of its statutory powers after they have come into existence. [Reference was also made to *Bynoe v. General Federation of Trade Unions Approved Society*.¹⁹]

Section 13 contemplates that the creditors shall either (a) accept a composition, or (b) apply for an adjudication order. Section 18 deals, inter alia, with the position if no resolution is passed—that is, if the creditors adopt neither (a) nor (b). Rule 219 falls exactly within the purview of sections 13 and 18 taken together. It sets out the principle clearly envisaged in section 13 and elaborates and explains what is meant by “pass ‘no resolution.’” Section 18 does not define the limits of the powers of the court; it merely gives examples of the exercise of those powers. Rule 219 does not extend the jurisdiction of the

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¹³ (1885) 2 Morr. 92.¹⁷ [1894] A.C. 347.¹⁴ (1887) 18 Q.B.D. 393.¹⁸ 1915 S.C. 504.¹⁵ [1894] A.C. 347; 10 T.L.R. 527.¹⁹ [1937] Ch. 628 (affirmed [1938]¹⁶ [1931] A.C. 494; 47 T.L.R. 337.

Ch. 164; 54 T.L.R. 61).

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court. In *In re Pinfold*²⁰ rule 192 of the Bankruptcy Rules, 1886, was regarded as being explanatory of the then section 20, now section 18. Extending the jurisdiction of the court means giving the court some new power—not merely specifying the manner in which power given by section 105 and which is implicit in the whole Act is to be exercised.

The case is within the scope of section 18 (1). “No resolution” means “no relevant resolution.” A resolution that the debtor be not adjudged bankrupt is not a relevant resolution and is not one which it is competent for the creditors to pass, for that would be usurping the powers and duties of the court: see *In re Thurlow* (Lord).²¹

Cyril Salmon Q.C. in reply. The power to adjudicate is purported to be conferred by sections 14, 16 and 18, but rule 219 clearly goes beyond the events there specified. It may be inconvenient if the debtor's contention is right, but it must be borne in mind that adjudication changes the status of the debtor and has quasi-criminal consequences, and it is, therefore, a power which must be conferred by plain words. In sections 14, 16 and 18 plain words have been used. The argument founded on section 168 begs the question, for only rules made under the Bankruptcy Acts, 1883 to 1913 (that is, “validly made”), were continued in force by section 168, and the vital question here is whether the rule is, or is not, within the bankruptcy legislation. Section 168 cannot be read as making valid something extending the jurisdiction of the court. There is no authority for construing an Act of Parliament as validating as a rule in force a rule which was invalid under an earlier Act. The suggestion that Parliament in construing an earlier Act may have acted as its own interpreter was rejected in *Ormond Investment Co. Ltd. v. Betts*²² except where there is ambiguity: see Lord Sumner's speech.²³ Here there is no ambiguity. If the reference in section 168 to the rules made under the earlier Acts is only a description and a method of identification, the rules had legislative force only for the short period of which section 168 spoke. Usage does not assist the construction: *Magistrates of Dunbar v. Roxburghe (Duchess of)*.²⁴ The fact that the Board of Trade and others concerned acted on the assumption that the rules were valid, that Parliament thought that they were valid, and that it is convenient that they should be valid, are all irrelevant considerations if the

²⁰ [1892] 1 Q.B. 73; 8 T.L.R. 73.

²² [1928] A.C. 143.

²¹ [1895] 1 Q.B. 724, 729; 11

²³ *Ibid.* 159.

T.L.R. 299.

²⁴ (1835) 3 Cl. & Fin. 335.

language of the statute is clear. The intention of the legislature can only be arrived at by considering the language used: *King-Emperor v. Benoari Lal Sarma*²⁵ and *Leader v. Duffey*.²⁶

Even if section 168 gave statutory force to the then relevant rules, it only applied to the rules made under the Act of 1883. It does not follow that the present rules are validly made under section 132. Undoubtedly the present rules purported to be made under section 132, but they were not in fact so made.

It would no doubt be convenient if section 72 of the Act of 1883, now section 105, contained a general power to adjudicate in order to give effect to the general purpose of the bankruptcy legislation, but that has not hitherto been suggested. If there was such a general power, sections 14, 16 and 18, and also rule 223, would be otiose. If section 105 does not contain a general power, it is impossible to imply one, for the power to adjudicate is entirely a creature of statute and is limited to the circumstances specified in the Acts.

It was submitted on behalf of the official receiver that sections 132 and 168 should be construed as if Parliament intended that the Lord Chancellor and the Board of Trade should have power to pass these rules. Extraneous circumstances, however, are only relevant if there is ambiguity in the Act. Secondly, the official receiver says that if the old rule was invalid, then section 168 puts it right. That argument is only germane if the old rules were invalid, and if Parliament intended to validate what was otherwise invalid this would be a curiously inappropriate way of doing it. The obvious intention of section 168 was to preserve in being rules which Parliament, being taken to know the bankruptcy law, doubtless thought were validly made under the old Act but which would have ceased to be effective with the repeal of that Act. The section was attempting merely to keep the rules in force until rules could be made under the new Act. Section 168 only refers to rules "made" under the old Act and would not appear to apply to rules which were then *ultra vires*.

If section 168 validated rules *de facto* made under the old Act as if made under section 132, it only did so until they were revoked, and they have now been revoked. It does not follow that a new set of rules made under section 132 are equally valid. The new rules are in the same terms as the old which, but for the express validation by section 168, must have been invalid, and therefore the new rules are *ultra vires* section 132. Section

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²⁵ [1945] A.C. 14; 61 T.L.R. 54; ²⁶ (1888) 13 App.Cas. 294.
[1945] 1 All E.R. 210.

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168 is not intended to throw light on the meaning of section 132, still less to confer any jurisdiction on the court which was not already conferred by sections 14, 16 and 18. Without doing violence to the language used, it is difficult to construe section 168 as validating something already invalid or as extending the jurisdiction of the court.

In re de la Porte ²⁷ is useful as showing that there is a well-established practice founded on the assumption that the rule was validly made, but the case is no authority for saying that the relevant rule was in fact *intra vires*. There is no indication in the report that the point was taken. Several weaker points are mentioned, and one would expect that if this matter had been canvassed it would have been mentioned. In section 18 the direction is that if the creditors do not take advantage of the courses open to them the court "shall" adjudicate, but Vaughan Williams J. in *In re Pinfold* ²⁸ said that that did not mean that the court had no choice but to order an adjudication when once it was shown that there had been a failure to accept the composition in pursuance of the Act. Even if no composition is proposed, up to the stage of the public examination, the creditors can still decide whether the debtor should, in their interests, be made bankrupt or not. In *In re Thurlow (Lord)* ²⁹ the public examination had been concluded and the creditors had passed no resolution. It was there held that the court had a discretion whether to adjudicate or not at that stage of the proceedings irrespective of the wishes of the creditors. It does not follow, therefore, that in the absence of a resolution the debtor will be left suspended indefinitely, though the holding of the public examination may be postponed indefinitely. It is, however, unlikely that if the debtor absconded the creditors would want to hold up the adjudication.

Beyfus Q.C. This case is the converse of *Ormond Investment Co. Ltd. v. Betts*, ³⁰ for here it is sought to construe the most recent Act by reference to something which has already happened.

Cur. adv. vult.

May 25. The following judgments were read.

EVERSHED M.R. This is an appeal from an order, adjudicating the debtor a bankrupt, dated April 1, 1955. The order was made upon the application of the official receiver, pursuant to rule 219 of the Bankruptcy Rules, 1952, being Statutory Instrument No. 2113 of 1952. The sole point taken by the debtor

²⁷ [1915] 1 H.B.R. 98.

²⁸ [1892] 1 Q.B. 73, 75.

²⁹ [1895] 1 Q.B. 724.

³⁰ [1928] A.C. 143.

on the appeal has been that the making of the rule was beyond the rule-making powers conferred by section 132 of the Bankruptcy Act, 1914; so that, the rule being ultra vires and invalid, the order of adjudication made thereunder was wholly ineffective.

[His Lordship read rule 219 and section 132 and continued:] It has been the contention of the debtor that the powers of the court to make orders of adjudication being limited by other sections of the Act (of which the most material section is, for present purposes, section 18), rule 219, which purports to confer power on the court to make orders for adjudication in circumstances other than those specified in the sections in question (and particularly section 18), offends against the proviso to section 132 (1), "Provided that the rules so made shall not extend the "jurisdiction of the court"; and so is, *ex facie*, beyond the powers of the nominated rule-making authority; and that this is so, notwithstanding the fact that the rule (together with the other rules comprised in the statutory instrument of 1952) was admittedly laid before Parliament in accordance with section 132 (2).

I shall have to refer presently to a number of the sections of the Act of 1914 and also more specifically to the facts of the present case. But it may be said at once that if the law of bankruptcy, now contained in the Act of 1914 (as amended in 1926¹), had been enacted for the first time, say, in the year 1953, and if the present general rules in bankruptcy had been promulgated for the first time in 1954 in purported exercise of the powers to make such rules conferred by the Act, it would, I think, have been difficult to contend successfully (apart from Mr. Beyfus' argument based on the effect of section 132 (2) and the fact of the rules having been laid before Parliament as prescribed by that subsection) that the rule in question did not, by purporting to confer on the court powers in excess of those specified in the Act, exceed the limits of the authority delegated by Parliament. But the rule in question is the successor of other rules in substantially identical terms which have formed part of the bankruptcy code under the Act of 1914 and the earlier Act of 1883 for about two generations; and it has accordingly been the substance of Mr. Beyfus' argument that, upon various grounds, including particularly the language of section 168 of the Act of 1914, it is now too late to challenge successfully the validity of the rule.

Having regard to the nature of that argument, it will be

¹ Bankruptcy (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 7).

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useful for me to begin this judgment by some recollection of the history of our bankruptcy jurisdiction. That jurisdiction rests exclusively upon enacted law. The first of the statutes regulating the affairs of insolvent persons and the distribution of their effects was that of 34 & 35 Henry VIII, chapter 4, in the year 1542. It is, however, unnecessary to go further back than the Bankruptcy Act, 1869. By that Act it was provided that, if a debtor committed any of the acts known as acts of bankruptcy and defined by section 6 of the Act in terms corresponding to section 1 of the present Act, a petition might be presented for his adjudication as a bankrupt. Section 8 of the Act then provided in perfectly general terms that (subject to satisfaction of conditions as to proof of the act of bankruptcy and the like) the court (as defined in the Act) should make an order for adjudication. The Act also contained, in section 72, a general statement of the powers of the court in terms corresponding to those of section 105 of the present Act (to which I shall later refer) and, in section 78, a general rule-making power.

The Act of 1869 was replaced by the Bankruptcy Act, 1883. Section 4 of the latter Act specified, in the same way as had section 6 of the Act of 1869, the acts of bankruptcy, the commission of one or other of which was the necessary foundation for the exercise by the court of bankruptcy jurisdiction. But the Act of 1883 introduced for the first time [by section 5] the innovation of the receiving order, which (apart from certain cases where a debtor sought adjudication upon his own petition) became the first consequence liable to ensue upon the invocation of the powers of the court after the commission of an act of bankruptcy. The effect of a receiving order, as its title implies, is not to divest the debtor of his assets for distribution among his creditors, but to require the official receiver to receive and hold them, the debtor being thenceforward, in general, protected from proceedings against him by his creditors. The purpose of the receiving order is, I think, quite plainly to give to the creditors an opportunity of deciding whether, as an alternative to adjudication, they would be prepared to accept a proposal for a composition or scheme of arrangement. So much appears to me to follow from the provisions in the statute for calling meetings of the creditors, to which I will presently return. But the operation of the receiving order was, and is, intended, in my view, to be of strictly limited duration. As was said by Cozens-Hardy M.R. in this court in *In re de la Porte* ² in the year 1910

² [1915] 1 H.B.R. 98.

(a case which was concerned with rule 192 under the Act of 1883, a rule identical in terms with the present rule 219, and to which I shall later again refer), “. . . the legislature does not think “that it is desirable that there should be a large class or a small “class of men against whom a receiving order has been made “and who occupy that peculiar *status* for an indefinite time. “The view of the legislature is that under ordinary circum- “stances, unless a scheme is accepted either at the first meeting “or at one adjournment thereof, then on the application of the “official receiver the debtor may be adjudicated bankrupt.”

Accordingly, as I have already intimated, by section 15 of the Act of 1883 (the terms of which correspond with those of section 13 of the present Act) it was provided that as soon as might be after the making of a receiving order a general meeting of creditors should be held for the purpose of considering whether a proposal for a composition or scheme of arrangement should be entertained or whether it would be expedient that the debtor should be adjudged bankrupt. It will be observed that the alternatives suggested for the meeting were either (a) acceptance of a composition, or (b) the debtor's adjudication. When, however, I turn to those sections, which, under the Act of 1883, provide in terms for adjudication, it will be noted at once that (in lieu of the general terms of the provisions of section 8 of the Act of 1869) the circumstances in which an order for adjudication might or should be made appear on the face of them to be specific and limited. Section 16 (3) (now section 14 (3) of the Act of 1914) and section 18 (11) (now section 16 (16) of the Act of 1914) provided respectively for the cases where the debtor failed to comply with his obligations as regards a statement of affairs or had made default in payment of an instalment under a scheme of composition. For present purposes, these sections need not be further noticed except to observe that in each case, as in their modern counterparts, the court's functions are expressed on the face of them as discretionary rather than obligatory—“the court *may* adjudge the debtor bankrupt.” It is also unnecessary to notice for present purposes the special provisions for adjudication upon the debtor's own petition.

I turn to section 20 (1) of the Act of 1883, which is in terms identical with section 18 (1) of the Act of 1914. [His Lordship read the subsection, and continued:] There is no other provision in the Act of 1883 (or, correspondingly, in the Act of 1914) which is in terms directed to the making of orders for adjudication by the court. And it will be seen at once that upon the

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face of the subsection which I have quoted the power (or duty) of the court to adjudicate appears to be limited to the happening of one or other of the events specified therein. The facts in the present case are that, at the first and adjourned meeting of the creditors, after the making of the receiving order on October 12, 1954, the creditors, having before them no proposal for composition or scheme of arrangement, resolved (at the adjourned meeting) "that the debtor be not adjudged bankrupt but that "this meeting be adjourned for three months to enable such "proceedings to be taken as may be advised after further "consideration by counsel of the matters referred to at this "meeting."

It has, therefore, been contended for the debtor that since the creditors did pass a resolution, and since in fact no examination of the debtor has yet taken place, the case is outside the purview of the present section 18 and that it is outside the powers of the court as defined by the statute to make any order for adjudication.

As Mr. Beyfus contended in the course of his argument, it would appear to follow, if the debtor's contention is correct, that where a debtor had left the country and could not, therefore, be examined, then, so long as meetings of his creditors (who might include among their number friends or associates favourable to him) were minded to pass resolutions of some kind other than a resolution in favour of adjudication, the "peculiar status" under the receiving order would continue indefinitely.

I must, however, first complete my references to the Act of 1883. Section 102 (1) of the Act is in terms identical with section 105 (1) of the Act of 1914. The subsection contains (in each case) the only general statement of the powers of bankruptcy courts. It is as follows: "Subject to the provisions of "this Act, every court having jurisdiction in bankruptcy under "this Act, shall have full power to decide all questions of "priorities, and all other questions whatsoever, whether of law "or fact, which may arise in any case of bankruptcy coming "within the cognizance of the court, or which the court may "deem it expedient or necessary to decide for the purpose of "doing complete justice or making a complete distribution of "property in any such case;". I need not read the proviso.

Finally, in section 127 of the Act of 1883, there was conferred a power to make general rules, the section corresponding to section 132 of the Act of 1914 (already quoted), save that the all-important proviso to subsection (1) of the latter section

appeared as a separate subsection in the Act of 1883 (subsection (4)).

Thus, the character of the statute of 1883, in all respects material for present purposes, is wholly similar to that of the Act of 1914. But, notwithstanding the apparently limited and defined powers of the court to adjudicate, the rule-making authority proceeded in 1886 and 1890 to promulgate a body of general bankruptcy rules which included as rules 190, 191 and 192 counterparts of the present rules 217, 218 and 219. Rule 192, indeed, took in 1890 the precise form which has ever since been followed and which is now comprised in rule 219. It will be noted that it purports to empower the court to make an adjudication order whenever the creditors have not resolved to accept a composition or scheme at their first meeting or any adjournment thereof, without regard to the happening of any other of the events specified in section 18 (1) of the present Act (section 20 (1) of the Act of 1883)—in particular whether or not the creditors have passed any other form of resolution. It will be noticed, also, that the power so expressed to be conferred may be exercised “on the application of the official receiver or of any “person interested,” whereas the duty to adjudicate which section 18 (1) of the present Act (or section 20 (1) of the former Act) appears to impose is not expressed to be dependent upon any application on the part of anyone.

It is not open to doubt that the rules first made in 1886 and 1890 and their successors have ever since their first appearance been generally accepted as part of the bankruptcy code; nor can it be doubted that numerous persons have, during that substantial period of time, been adjudicated bankrupt by the court in the exercise of its professed jurisdiction under the old rule 192 and its later successors. In *In re Hann, Ex parte Foreman*,³ in this court, the question was raised whether the old rule 111 (2) (see now rule 127 (a)) restricting rights of appeal in certain instances from decisions of the Bankruptcy Court was *intra vires* the rule-making authority under section 127 of the Act of 1883; and this court held that it was, the subject-matter being fairly within the “objects of the Act,” having due regard to the terms of section 104 (2) (a) of the Act. Apart from *In re Hann*,³ no case has been found or was cited to us in which the *vires* of the rules, and particularly of the old rule 192, were ever challenged in the courts. Not only so, but in *In re de la Porte*,⁴ already mentioned, an appeal against adjudication under that rule was dismissed by

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³ (1887) 18 Q.B.D. 393.

⁴ [1915] 1 H.B.R. 98.

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this court. I have already quoted from the language used in his judgment in that case by Cozens-Hardy M.R.⁴ It does not, however, appear from the available reports of the case and the official file (which we have examined) that the question of the validity of the rule was raised in the course of the case, though I observe that the counsel engaged included no less an authority than Mr. E. W. Hansell for the appellant debtor and Sir John Simon as Solicitor-General for the official receiver. Five years later the successor to rule 192 was before this court,⁵ which again treated the rule as valid and dismissed the appeal against an adjudication order made thereunder: see *In re Silber*.⁶

Mr. Beyfus' first argument was based on the interpretation of the Act of 1914 without regard to the matters of history to which I have referred—a question, as he put it, of “pure construction”—and was that the rule did not offend against the proviso to section 132 (1) of the Act, because the words of section 105 (1) were wide and apt enough to confer upon the court power to make an adjudication order at any time after the making of a receiving order, or at least at any time after a failure of the creditors at their first meeting or one adjournment thereof to accept a proposal for composition or scheme of arrangement.

I have already indicated that this argument is, to my mind, fraught with formidable difficulties. I should have expected a section, intended to confer a general overriding power to adjudicate, to be found, or at least referred to, in that part of the Act devoted to adjudication. I find, instead, under the cross-heading “Adjudication of bankruptcy . . .”, the specific provisions of section 18 which (upon the view contended for) are at any rate in large measure otiose: for it has been held that the word “shall” in section 18 is directory rather than obligatory.

But I think, further, that the terms of section 105 (1) are, upon their natural sense, directed rather to the court's jurisdiction in general but incidental matters arising in the course of a bankruptcy. I need not, however, pursue the point further or express any final conclusion, having regard to the view I have formed upon one branch of Mr. Beyfus' later and more substantial argument. I add, however, that I have referred to Williams on Bankruptcy, 5th ed., published in 1891 and edited by Mr. E. W. Hansell, and I have not found in the notes to section 102 (1) of

⁴ [1915] 1 H.B.R. 98.

⁶ [1915] 2 K.B. 317; [1915] 1

⁵ Bankruptcy Rules, 1915, r. 223.

H.B.R. 95.

the Act of 1883⁷ any suggestion that the makers of rules 190 to 192 of the old rules derived their authority from that subsection.

The first branch of what I have called Mr. Beyfus' more substantial argument invoked what he claimed to be the sense and purpose of the legislation and also the long-established practice to which I have alluded, in order to influence the construction of the Act and particularly of section 105 (1) in his favour. Mr. Beyfus prayed in aid the well-known canon of the construction of statutes to the effect that the courts will tend, if it is fairly open to them to do so, to construe the language of a statute in a way which will avoid an anomalous or insensible result: see, for example, *Caledonian Railway Co. v. North British Railway Co.*,⁸ per Selborne L.C. In this connexion, Mr. Beyfus referred to the passage from Cozens-Hardy M.R.'s judgment in *In re de la Porte*⁹ in support of his proposition that the legislature could not be taken to have contemplated, in any circumstances, a substantial period of operation of the receiving order.

Mr. Beyfus went further and cited to us the dicta of great judges to the effect that the courts will construe a statute in conformity with well-established practice thereunder, even though the terms of the statute do not, prima facie, tend to such an interpretation: *Income Tax Special Purposes Commissioners v. Pemsel*,¹⁰ per Lord Macnaghten; *Rex v. Crewe (Earl)*,¹¹ per Vaughan Williams L.J.; and the Privy Council case of *Sobhuza II v. Miller*,¹² per Lord Haldane, delivering the judgment of the Board. To Mr. Salmon's natural question, What was the provision in the Act of 1914 which he sought so to construe?, Mr. Beyfus submitted that the Act should be read, in accordance with the general scheme of bankruptcy jurisdiction which had found clear expression in the Act of 1869, as containing an implied power in the court to adjudicate subject only to the necessary incidence of the introduction of the stage of the receiving order. Alternatively, Mr. Beyfus fell back upon the general terms of section 105 (1).

There is, to my mind, obvious and serious difficulty in the way of reading a power by way of implication into a statute containing express provisions which would be inconsistent with

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⁷ At p. 271.

⁸ (1881) 6 App.Cas. 114, 122.

⁹ [1915] 1 H.B.R. 98.

¹⁰ [1891] A.C. 531, 590; 7 T.L.R. 657.

¹¹ [1910] 2 K.B. 576, 596; 26

T.L.R. 439.

¹² [1926] A.C. 518, 524; 42 T.L.R.

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1955 no case was cited illustrative of such a process.

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As to the terms of section 105 (1), I have already pointed out objections to a reading of them so as to enable them to confer a general power of adjudication. Attention was also drawn in the course of the argument to the terms of rule 218, which provides for the making of an order of adjudication (*inter alia*) if “any of the other events specified in the Act have occurred.” (The old rule 191, though different in form, made similar provision.) Rule 218 derives its force from the same authority as rule 219; but it is difficult to suppose that the phrase I have quoted could have been intended to refer to events other than those specified in sections 14, 16 and 18, a view which is not easy to reconcile with the proposition that, by virtue of section 105 of the Act, a wide power of adjudication was contemplated, not limited to the events particularized in the three named sections.

Mr. Salmon, therefore, contended that Mr. Beyfus’ argument involved not so much a construction of section 105 as a torturing of its language. Nevertheless (as Mr. Salmon frankly conceded), it is not only natural but desirable and proper that the court should, if it fairly can, so construe the statute as to make it conform to long-established and well-accepted bankruptcy practice; and all the more so if Parliament must be assumed, in enacting the Act of 1914, to be conscious of that practice, as suggested by the language of Selwyn L.J. in *In re Barned’s Banking Co. (Kellock’s case)*.¹³ I feel, therefore, for myself, the force of this part of Mr. Beyfus’ argument. And, as he showed, Vaughan Williams L.J., in *Rex v. Crewe*,¹⁴ felt able, on this ground, to accept a construction of the statute there in question which was inconsistent with the interpretation to which its language would, naturally and unaided by considerations of established practice, have led. He said¹⁵: “I think that the power “given by section 5 of the Act of 1890¹⁶ to extend the operation “of certain repealed enactments in the First Schedule to any “foreign country in which for the time being Her Majesty has “jurisdiction as if the country were a British possession, and as if “Her Majesty in Council were the Legislature of the possession, “rather favours the limitation of the statute to Her Majesty’s “subjects suggested by Mr. Hall; and I think that sections 2 and “12 recognize this limitation of extraterritorial jurisdiction to Her “Majesty’s subjects. I think, however, that the interpretation

¹³ (1868) L.R. 3 Ch. 769, 781.

¹⁴ [1910] 2 K.B. 576.

¹⁵ *Ibid.* 596.

¹⁶ Foreign Jurisdiction Act, 1890.

“ which has been acted upon for so many years in Orders in Council and the proclamations thereunder applying the provisions of the Foreign Jurisdiction Act, 1890, to natives of such foreign countries as well as to British subjects resident in or resorting to such foreign country makes it impossible now to adopt the interpretation suggested by Mr. Hall.”

But, again, I find it unnecessary to express upon this matter any concluded opinion. For, in my judgment, Mr. Beyfus is entitled to succeed upon the second branch of this part of his case, which turns upon the language of section 168 (3) of the Act of 1914. That subsection reads: “ Until revoked or altered under the powers of this Act, any fees prescribed and any general rules and orders made under the Bankruptcy Acts, 1883 to 1913, and the Bankruptcy (Discharge and Closure) Act, 1887, which are in force at the commencement of this Act, shall continue in force, and shall have effect as if made under this Act.”

Mr. Beyfus contended, and I think rightly, that the effect of that subsection was not only to give, notwithstanding the repeal of the Act of 1883, statutory force to the existing Bankruptcy Rules of 1886 to 1890 (including particularly rule 192), but also to give a legislative imprimatur to the proposition that such rules would have been validly made under section 132 (1) of the Act of 1914; with the necessary consequence that rules subsequently made in identical or substantially identical terms under the same section would have the same force and efficacy.

Mr. Salmon's first answer to this argument was to suggest that it involved a *petitio principii*, inasmuch as section 168 (3) was in terms confined to “ general rules . . . made under the ” earlier Act; and that the whole of his challenge to the validity of rule 219 was founded on the proposition that its predecessor rule 192 had not been “ made under,” that is, properly made under or in accordance with the Act of 1883. But, in my judgment, Parliament must be clearly taken, by the phrase I have quoted, to have intended a reference to the general code of rules, part of the existing body of statutory rules and orders, and (as I have many times said) long accepted and established as effectually “ in force.” As regards rule 192, the case is all the stronger since it must, according to well-settled principles, be presumed that Parliament had taken notice of the decision of this court in *In re de la Porte*,¹⁷ in which the rule had been

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¹⁷ [1915] 1 H.B.R. 98.

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1955 observations of Selwyn L.J. above mentioned.¹⁸)

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But Mr. Salmon further submitted that even if the old rules must be taken, as a consequence of the subsection, to remain in force until revoked as if made (that is, validly made) under the Act of 1914—as, in my judgment, they clearly must—the efficacy conferred should not extend beyond the old rules, so that when those rules were revoked or replaced by the new code, the latter must be justified, without regard to section 168, by establishing that they were, in truth, within the competence of the rule-making authority to make them under the other sections of the Act. I am also unable to accept this argument. If the effect of the subsection is that rule 192 (for I can confine myself to that rule for the purposes of the present case) is to be treated as having been made, and validly made, under section 132 of the Act of 1914 (as I think it necessarily is by virtue of the words "shall continue in force"), then it must, in my judgment, follow that rule 219, being in terms identical with rule 192, must be regarded as validly made under the same section.

My conclusion upon the last point is sufficient to dispose of the case. But, out of respect for the arguments presented to us, I will deal briefly—but inconclusively—with Mr. Beyfus' last two contentions.

The first turns upon section 132 (2), which I have already read. It is conceded that the present series of rules, comprised in Statutory Instrument No. 2113 of 1952, was in fact duly laid before Parliament in pursuance of the subsection, as had been the rules of 1886 and 1890 pursuant to the corresponding section 127 (2) of the Act of 1883. It is also conceded that in neither case was any adverse resolution passed by Parliament. Mr. Beyfus has, accordingly, contended that the validity of the present rules cannot now be challenged, and the competence of those who made them cannot now be questioned in the courts; and that the same was true of the old rules of 1886 to 1890. Mr. Beyfus cited to us the well-known dicta of the majority of the House of Lords in *Institute of Patent Agents v. Lockwood*,¹⁹ and the dicta of the House (and particularly of Lord Thankerton) to the contrary effect in *Minister of Health v. The King*.²⁰ The circumstances of the present case provide, however, one special feature which may well be said not to have been present in

¹⁸ In *In re Barned's Banking Co.*,
L.R. 3 Ch. 769, 781.

¹⁹ [1894] A.C. 347; 10 T.L.R. 527.
²⁰ [1931] A.C. 494; 47 T.L.R. 337.

Lockwood's case²¹; for the power of the Lord Chancellor with the concurrence of the President of the Board of Trade to make general rules "for carrying into effect the objects of the Act" is expressly qualified by the proviso that such general rules "shall not" extend the jurisdiction of the court—and it is the gist of Mr. Salmon's argument that rule 219 does purport so to extend the court's jurisdiction. If a rule were made which quite plainly—and, if you will, deliberately—extended the court's jurisdiction, would the fact of such rule having been, without result, laid before Parliament as provided by section 132 (2), disable the court from pronouncing it invalid? In *In re Hann*,²² cited earlier in this judgment, a similar argument was put to this court; that is, that the effect of section 127 (2) of the Act of 1883 was to prevent the court from inquiring into the validity of the rule then being discussed. In the event, it was unnecessary for this court to decide the question; and Lord Esher M.R.²³ preferred not to express any opinion one way or the other upon it. I prefer, for my part, to follow Lord Esher's example.

Second, and last, Mr. Beyfus argued that the present appeal ought in any event to be dismissed, since the case fell, in truth, within the terms of section 18 (1) of the Act. As I have earlier observed, the effect of section 13 may be said to be that the creditors are given the choice of two alternatives, viz., (a) accepting a composition, or (b) resolving that the debtor be adjudicated. The creditors are not, according to the argument, entitled to embark upon a third course, declining to accept a composition but resolving that the debtor be not adjudicated; a course which might be said to be a usurpation by the creditors of the powers and duties of the court: see *In re Thurlow (Lord)*,²⁴ in this court, per Lord Esher M.R., where he said: "The administration of "bankruptcy matters from beginning to end takes place under "the supervision and absolute control of the Court of Bankruptcy, except so far as its powers are limited by Act of "Parliament. It is not for the creditors in the case to decide "how the bankruptcy law shall be administered; the court "constantly overrules their views, if it thinks they have been "persuaded to agree to some course which the court thinks an "improper one." So, Mr. Beyfus argued, the words "no "resolution" in the phrase in section 18 (1) "if the creditors . . . "pass no resolution" should be interpreted as equivalent to "no

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²¹ [1894] A.C. 347.²² 18 Q.B.D. 393.²³ *Ibid.* 399.²⁴ [1895] 1 Q.B. 724, 729; 11 T.L.R. 299.

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“ relevant resolution ”; and the resolution passed by the creditors at the adjourned meeting, which I have quoted, was not a relevant resolution, not a resolution which it was, for the purposes of the section, competent for the creditors to pass.

Mr. Salmon conceded that some limitation must be put upon the words “ no resolution.” It would not be possible, he agreed, for the creditors to seek to avoid the effect of section 18 (1) by passing some purely extraneous resolution—to take the example given in the course of the argument, a resolution that Parliament be dissolved. On the other hand, if Parliament had meant that the court’s duty should arise if the creditors did not pass a resolution in favour of adjudication, it would have been easy enough to say so. In the circumstances, as I have already indicated, I prefer also to express no view upon the question. But, for the reasons which I have given, I think that Mr. Beyfus’ argument upon section 168 (3) of the Act should succeed, and that the appeal, accordingly, ought to be dismissed.

HODSON L.J., having stated the facts and referred to section 132 of the Bankruptcy Act, 1914, continued: The argument is that rule 219 is invalid because its operation involves an extension of the jurisdiction of the court. The relevant statutory provision is contained in section 18 of the Act, which is said to give no such discretionary power to the court as is contained in rule 219, which must, accordingly, be *ultra vires*. [His Lordship read section 18 (1), rule 219 and continued:] It is unnecessary to decide the question whether there is in the scheme of the Bankruptcy Act implied authority for the rule, or, in particular, whether assistance can be gained from consideration of section 105, which deals with the general powers of the bankruptcy court.

Mr. Salmon contends with some force that if there is a general power of adjudication in section 105, or elsewhere in the Act, it is surprising that sections 14, 16 and 18 of the Act were included merely as examples of when that general power could be exercised. He conceded that the rule or its predecessor had been recognized as valid for many years; in particular, by this court, in the year 1910, in *In re de la Porte*,²⁵ reported as a footnote to *In re Silber*.²⁶ The rule then acted upon was rule 192, made in 1886 and assuming its present form in 1890, under the powers contained in the Act of 1883. Rule 192 was in similar terms to the rule now in question, and the Act of 1883 contained

²⁵ [1915] 1 H.B.R. 98.²⁶ [1915] 1 H.B.R. 95.

in section 20 a section corresponding to section 18 of the Act of 1914, and in section 127 a section corresponding to section 132 of the Act of 1914.

In my judgment, all doubt as to the validity of the rule is set at rest by the terms of section 168 (3) of the Act of 1914. [His Lordship read the subsection and continued:] The effect of the subsection is to declare that the previous rules are recognized as being in force and that they shall continue in force, and shall have effect as if made under this Act until revoked or altered. It would not, I think, be legitimate to read section 168 (3) as confined to rules which must necessarily, apart from this subsection, have been within the strict jurisdictional limits of the Act. The language is quite general in its reference to the rules, and describes and identifies those which are to continue in force and effect, and so cannot have been regarded by Parliament as made in breach of section 132 of the same Act. The reference to rules includes those of 1866 and 1890 in which rule 192 appears. The revocation of the rules of 1886 and 1890 by rule 2 of the rules of 1915, which contained a fresh rule, namely, rule 223, in the same terms as the previous rule 192, merely confirmed the existing position, and was itself replaced by the present rule 219 of the rules of 1952, which also, by rule 2, revoked the rules of 1915.

It would, to my mind, be wrong to hold that a rule expressly declared to have force and effect in 1914 until revoked, should, when later published in the same terms in further rules, be regarded as invalid as being in excess of jurisdiction, while its predecessor was expressly declared to be effective and so necessarily not in excess of jurisdiction. I agree, therefore, that the appeal should be dismissed.

ROMER L.J. The only question in issue on this appeal is whether the adjudication order, made against the debtor by the registrar on April 1, 1955, is invalid on the ground that rule 219 of the Bankruptcy Rules, 1952, under which the order was made, is *ultra vires* in view of the proviso to section 132 (1) of the Bankruptcy Act, 1914. This subsection authorizes the Lord Chancellor, with the concurrence of the President of the Board of Trade, to make general rules for carrying into effect the objects of the Act, and the proviso stipulates that "the general rules so made shall not extend the jurisdiction of the court."

Mr. Salmon, for the debtor, submitted to us that the grounds, and the only grounds, upon which the court can make an order of

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adjudication are those specified in sections 14, 16 and 18 of the Act, and that its jurisdiction in this respect is limited accordingly; and that it therefore follows that, inasmuch as rule 219 purports to add to these grounds, it is invalid because it is *pro tanto* extending the jurisdiction of the court.

Mr. Beyfus, for the official receiver, supported the validity of the rule in a number of ways, and points both difficult and interesting were argued before us. In my opinion, he is entitled to succeed by reason of section 168 (3) of the Act of 1914, and, with the Master of the Rolls, whose judgment I have had the advantage of reading, I would prefer to express no concluded opinion as to whether rule 219 should be upheld on any other ground as well.

This rule first made its appearance under the Bankruptcy Act, 1883, and later became rule 192 of the rules which were made in 1890 by virtue of section 127 of that Act, which was to the same effect as section 132 of the Act of 1914 and contained (in subsection (4)) a similar proviso. It is clear, therefore, that rule 192 was open to the same accusation of *ultra vires* as has been levelled against its successor in the present case. No case, however, or textbook was brought to our attention in which any such criticism has ever been made. Nor can it be said that the rule never came up for discussion or consideration. It was, for example, cited in argument before the Divisional Court in *In re Pinfold*.²⁷ One member of that court was Vaughan Williams J., who had a knowledge and experience of bankruptcy law and bankruptcy jurisdiction which has seldom, if ever, been rivalled. The report of the case reveals no indication that that learned judge expressed any doubt as to the validity of the rule. Again, in *In re Silber*²⁸ and in *In re de la Porte*,²⁹ the rule was considered by this court, and it does not appear to have been suggested by counsel or by any of the members of the court that the validity of the rule was open to suspicion. The effectiveness of the rule was, indeed, assumed by all concerned. It is true that its validity was not put in issue in any of the cases to which I have referred; and, indeed, it is because there has been no judicial decision upon the point that it has been brought before us in the present case. It is, however, clear, I think, that by 1914 the powers conferred by the rule of 1890 had become part of the *de facto* jurisdiction of the court, and had been accepted by the profession as such without, so far as is known, any

²⁷ [1892] 1 Q.B. 73; 8 T.L.R. 73.²⁹ [1915] 1 H.B.R. 98.²⁸ [1915] 1 H.B.R. 95.

dissonant voice being raised. Such, then, was the position when the Bankruptcy Act, 1914, passed into law.

[His Lordship read section 168 (3), as set out above, and continued:] Prima facie, rule 192 of the Rules of 1890 would be within the scope and operation of this provision. Mr. Salmon, however, submitted the contrary and said that only such of the earlier rules as had been validly made were continued in force by the section; and that, inasmuch as rule 192 was ultra vires on the same grounds as those on which he is challenging the validity of rule 219 of the Rules of 1952, section 168 (3) of the Act had no effect whatever upon it. His contention was, in short, that rule 192 had never had any force and, therefore, could not be continued in force; and that the words "shall have effect as if made under this Act" do not carry the matter any further, because if rule 192 had in fact been made under section 132 (1) of the Act of 1914, it would have been no more valid than its present successor. It appears to me that this is not a permissible way of construing section 168 (3). It cannot, in my judgment, be supposed that Parliament, when enacting that subsection, was contemplating that some of the rules which were then current were invalid or were even of doubtful validity; for if any suspicion had been entertained on the subject the legislature would presumably have revoked such of the doubtful rules as it disapproved of, and expressly validated the others rather than have left it to the courts on some future occasion to decide which of the rules were ultra vires and which were not.

In my opinion, the reference in the subsection to the previously made rules and orders "which are in force at the commencement of this Act" embraced the rules and orders which were de facto in force, whether validly made or not; and a fortiori the reference would include a rule such as rule 192 which had for years past been treated as valid by the courts. The intention of the legislature as expressed by section 168 (3) can hardly, I think, be open to doubt. A period of time would necessarily elapse after the passing of the Act of 1914 before any new rules could be made under section 132 thereof; and during that period the whole body of existing rules and orders was to continue in force—for otherwise there would be none. Interpreting, then, section 168 (3) in this way, the subsection may (for present purposes) be read as follows: "Until revoked, rule 192 made under the Bankruptcy Act, 1883, shall continue in force and shall have effect as if made under this Act." So read, it seems to me to be impossible to accept Mr. Salmon's suggestion that if the rule were in fact

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made, or purported to be made, under the Act of 1914, it would be invalid as being in conflict with the proviso to section 132 (1); for Parliament cannot have intended to enact a nullity. It is clear that the legislature intended rule 192 (among others) to have statutory force and effect. So also, of course, was section 132 (1) intended to have force and effect, and, accordingly, these two provisions, simultaneously enacted, must be read, if possible, so as to harmonize with one another. There is no difficulty, in my opinion, in achieving such harmony. As Parliament was continuing a power which had been conferred some 25 years previously, it must be taken (as it very reasonably may be taken) to have been treating that power as forming a part of "the "jurisdiction of the court" within the meaning of that phrase as used in section 132 (1) of the Act. If the phrase be read in that sense, the apparent conflict between the rule and the subsection which would follow upon the interpretation of the phrase on the construction which forms the basis of Mr. Salmon's argument is avoided. In my judgment, the expression "the "jurisdiction of the court" in section 132 (1) has the inclusive scope which I have indicated; from which it follows that neither rule 223 of the Rules of 1915 nor rule 219 of the present rules can be said to have extended the jurisdiction of the court, because the power to adjudicate in the events prescribed by these rules has at all times since, at all events, the passing of the Act of 1914, been within the legislative conception of that jurisdiction and the rules constitute a recognition, or confirmation, of that fact. I, accordingly, agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: Stoneham & Sons; Solicitor, Board of Trade.

E. D.

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22, 23;
July 14.

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[1955 B. No. 1317.]

Revenue—Estate duty—Property chargeable—Property deemed to pass—Settlement of assurance policies and cash—Cash invested under settlement—Tenant for life entitled to income from investments after specified period—Death of settlor nine years later—Claim for estate duty on life interest in policies—Policies interest in possession during life of settlor—Estate duty not payable—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

Settlement—Interest in possession—Policy of assurance.

By a settlement made in 1929 a settlor assigned to the bank two fully paid policies of insurance on his life and also paid to the bank £12,000 in cash on trusts declared in the settlement.

Clause 2 of the settlement provided: "The bank shall out of the proceeds of the . . . policies pay all death duties if any leviable at the death of the settlor in respect thereof . . . and shall invest the residue of the said moneys and shall forthwith invest the said sum of £12,000 (which moneys and the property for the time being representing the same and the accumulations of the income thereof . . . are hereinafter called 'the trust fund') in the name of the bank" in investments mentioned in the settlement. Clause 3 directed the bank to accumulate the income of the trust fund until June 30, 1942.

Clause 4 provided that after that date "the bank shall pay the income of the trust fund and of the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof however not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested) . . ." in the events which happened to the settlor's nephew J.B. for his life. The income of the trust fund was accordingly paid to J.B. from June 30, 1942.

The settlor died in 1951 and bonds and cash amounting to £19,753 2s. were received by the bank in satisfaction of the two policies; and the crown claimed estate duty under section 2 (1) (d) of the Finance Act, 1894, on the life interest of J.B. in that sum. The Crown contended that since, under the terms of the settlement, J.B. had no right to receive income from the policy moneys during the life of the settlor, his life interest did not fall into possession until the settlor's death:—

Held, that the interest of J.B. in the policies was on the true construction of the settlement a life interest in possession from June, 1942, so that no beneficial interest arose on the death of the settlor to attract estate duty. Although possession connoted the

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right to receive rents and profits, the fact that there were no rents or profits did not mean that no one was in possession.

D'Avigdor-Goldsmid v. Inland Revenue Commissioners [1953] A.C. 347; [1953] 1 All E.R. 403 and *Lord Advocate v. Hamilton's Trustees*, 1942 S.C. 426 applied. *Attorney-General v. Dobree* [1900] 1 Q.B. 442; 16 T.L.R. 80 not followed.

ADJOURNED SUMMONS.

This originating summons issued under Ord. 54A, r. 1a, of the Rules of the Supreme Court and in pursuance of section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, raised the question whether estate duty was payable under section 2 (1) (d) of the Finance Act, 1894,¹ on the death of a settlor in respect of the life interest of a beneficiary under the settlement in two policies of assurance upon the settlor's life.

The settlor, Sir John Milne Barbour, died in 1951, domiciled in Northern Ireland, but the two policies in question, effected with the Scottish Amicable Life Assurance Society, being under seal and physically situated in England at his death were locally situated in England, and estate duty, if payable upon them, was payable in England and not only in Northern Ireland as was the case with the rest of the settled property. The settlement was a voluntary settlement made on March 5, 1929, between the settlor of the one part and the Westminster Bank Ltd. of the other part, by which he assigned to them, among other property, the two life policies in question which were at the date of the settlement already fully paid. One of them was dated July 16, 1919, and involved the payment of annual premiums up to the year 1928. The sums assured were two 4 per cent. Victory Bonds each for £5,000, and it was provided that if either of the bonds assured were drawn during the currency of the policy a certain sum in cash should be paid to the assured or his assigns forthwith with a reduction of the sum payable on maturity. The other policy was dated September 12, 1928, and involved the payment of a single premium, the sum assured being £7,000.

By the settlement the settlor assigned to the bank these and other policies and handed over a sum of £12,000 cash on the trusts there declared. Clause 2 provided: "The bank shall out of the proceeds of the said respective policies pay all death

¹ Finance Act, 1894, s. 2 (1):
"Property passing on the death of the
"deceased shall be deemed to include
"the property following, that is to
"say:— . . . (d) Any annuity or other
"interest purchased or provided by the

"deceased, either by himself alone or
"in concert or by arrangement with
"any other person, to the extent of
"the beneficial interest accruing or
"arising by survivorship or otherwise
"on the death of the deceased . . ."

“duties if any leviable at the death of the settlor in respect thereof and all costs and expenses incurred by the bank in connexion with the collection and receipt of the proceeds of the said policies and shall invest the residue of the said moneys and shall forthwith invest the said sum of twelve thousand pounds (which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called “the trust fund”) in the name of the bank” in any of the investments therein mentioned.

By clause 3 the bank was directed to accumulate the income of the trust fund until June 30, 1942. Clause 4 was in these terms: “From and after the said thirtieth day of June One thousand nine hundred and forty two the bank shall pay the income of the trust fund and of the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof however not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested) to the settlor’s son John Milne Barbour during his life.”

By clauses 5, 6 and 7, the bank was directed to hold the capital and future income of the trust fund and the accumulations after the death of the settlor’s son John in trust for his sons. Clause 8 provided that on failure of those trusts the settlor’s nephew James Barbour and his issue were to take corresponding interests, and clause 9 provided that on failure of that trust there should be similar trusts in favour of a nephew John Doherty Barbour and his issue, and there were divers remainders over.

The settlor’s son died in 1937 without issue before the end of the period of accumulation. In and since 1942, when the accumulation period ended, the income of the trust fund had been paid to the settlor’s nephew James. He had at present no issue. John Doherty Barbour was living and had issue two sons, one of whom had attained 21. On the death of the settlor in October, 1951, Victory Bonds and cash to the value of £19,753 2s. were received by the bank in satisfaction of these two policies, and it was on the life interest of James Barbour in this sum that the Crown claimed duty.

It was stated in the course of the hearing, although it did not appear in evidence, that one of the Victory Bonds included in the first policy was in fact drawn in the lifetime of the settlor and a sum was paid to the bank in accordance with the terms of the policy and invested and the income paid to James Barbour.

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The question on the summons for the determination of the court was whether having regard to the provisions of the settlement of 1929, and in the events that had happened, estate duty became payable under section 2 (1) (d) or otherwise on the death of the settlor Sir John Milne Barbour, in respect of the life interest of James Barbour in the money or property assured by the above-mentioned policies of assurance.

The Crown contended that under the terms of the settlement James Barbour had no right to receive income from the policy moneys during the life of the settlor, and therefore his life interest did not fall into possession until the settlor's death.

Geoffrey Cross Q.C. and *J. A. Wolfe* for the Westminster Bank Ltd. As a matter of principle the Crown's claim to duty on the life interest of James Barbour is not well founded: *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*.² The bank submit that *Attorney-General v. Dobree*³ was wrongly decided, and that the argument put forward there by *Haldane Q.C.*⁴ should have succeeded. The Court of Appeal in the *D'Avigdor-Goldsmid* case⁵ had thought that *Attorney-General v. Dobree*⁶ was irreconcilable with *Lord Advocate v. Hamilton's Trustees*,⁷ and they preferred to follow the law as laid down in *Attorney-General v. Dobree*⁸ and *Attorney-General v. Robinson*,⁹ particularly in view of the approval given to the judgment of Palles C.B. in *Robinson's* case⁹ by the Court of Appeal in *Attorney-General v. Murray*.¹⁰ The House of Lords in *D'Avigdor-Goldsmid's* case,¹¹ however, established that *Lord Advocate v. Hamilton's Trustees*¹² was correct, and held that no beneficial interest arose on the death of the settlor in respect of the insurance policy in that case: *D'Avigdor-Goldsmid's* case.¹³

The interest provided by the deceased here was the benefit of the policies, and the Crown, to succeed, must establish that the life tenant's interest in those policies arose on the death of the deceased. The Crown's contention rests on the reasoning of Palles C.B. in *Attorney-General v. Robinson*,¹⁴ but the fallacy underlying it was indicated by the House of Lords in *D'Avigdor-Goldsmid's* case.¹⁵

² [1953] A.C. 347; [1953] 1 All E.R. 403.

³ [1900] 1 Q.B. 442; 16 T.L.R. 80.

⁴ [1900] 1 Q.B. 446.

⁵ [1953] A.C. 347.

⁶ [1900] 1 Q.B. 442.

⁷ 1942 S.C. 426.

⁸ [1900] 1 Q.B. 442.

⁹ [1901] 2 I.R. 67.

¹⁰ [1904] 1 K.B. 165; 20 T.L.R. 137.

¹¹ [1953] A.C. 347.

¹² 1942 S.C. 426.

¹³ [1953] A.C. 347.

¹⁴ [1901] I.R. 442.

¹⁵ [1953] A.C. 347.

The policy was in the nature of a reversionary interest, and it cannot be said that merely because it was a reversionary interest that it had not fallen into possession, and that it was a new interest arising on the death of the settlor. There was no accruer of interest on his death and no interest arose thereon: see *Lord Advocate v. Hamilton's Trustees*,¹⁶ which was approved in *D'Avigdor-Goldsmid*¹⁷; but *Hamilton's case*¹⁸ cannot stand with *Attorney-General v. Dobree*.¹⁹ Once the fallacy of the judgment of Palles C.B. is disregarded, there is no interest arising on the death, but merely an increase in value on the maturity of the policies. The trust fund changed in character but the nature of the interest did not change. The court should take the step left open in *D'Avigdor-Goldsmid*,²⁰ and hold that the settlement of the policies made no difference. [*Inland Revenue v. Scott's Trustees*²¹ was also referred to.]

J. A. Wolfe following. It can make no difference merely because the donor gives his property away for interests in succession. No claim for duty arises where the donor gives away chattels and survives for five years, and it would be anomalous if duty were payable because the property consisted of policies. Lord Morton in *D'Avigdor-Goldsmid*²² expressly approved the passage in *Hamilton's case*²³ which governs the present case.

John Pennycuik Q.C. and *E. Blanshard Stamp* for the Crown. On the true construction and effect of this settlement James Barbour did not take a life interest during the life of the settlor, and he had only a life interest in expectation until the death of the settlor. *D'Avigdor-Goldsmid*²⁴ does not, on the true construction of this settlement, apply on an analysis of what is meant by interest in possession. On the death of the settlor James Barbour took for the first time a life interest which was no longer defeasible: *Attorney-General v. Lloyds Bank Ltd.*²⁵

If a person settles the whole corpus of any property the interest where that word is used means the beneficial interest in that property; that is the first thing which *D'Avigdor-Goldsmid*²⁶ decided. A policy is merely a contract of insurance and for the purpose of estate duty it is treated in the same way as any other item of property. If there is an absolute gift of an item of property no further interest in that property arises on the death

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¹⁶ 1942 S.C. 426.¹⁷ [1953] A.C. 347.¹⁸ 1942 S.C. 426.¹⁹ [1900] 1 Q.B. 442.²⁰ [1953] A.C. 347.²¹ 1918 S.C. 720.²² [1953] A.C. 347, 373, 374.²³ 1942 S.C. 426.²⁴ [1953] A.C. 347.²⁵ [1935] A.C. 382.²⁶ [1953] A.C. 347.

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of the donor, but if the property is settled on trust under which an interest does arise on the settlor's death, then duty is payable as in any other case.

The only conceivable circumstances in which the trustees could have found themselves in possession of something other than the policy would be the unlikely case of the insurance company going into liquidation, but their duty would then be to invest in ordinary investments and to accumulate the income during the life of the settlor.

If James Barbour had an interest in possession in these policies the Crown does not contend that estate duty would be payable.

[HARMAN J. Who did have the interest?]

No one did. Certain property does not produce income; reversionary interests and insurance policies are the most important type; chattels are a different class; they are enjoyed according to their nature. If the terms of the trust are such that the trustees can realize the non-income-bearing property but the beneficiary does not have any benefit, then it is impossible to say that the beneficiary had any interest in possession: see definition of "possession" in the Settled Land Act, 1925, s. 117 (1) (xix). For a person to be in possession he must have the income of the property or the right to receive the income. Where that is not the case a life tenant does not have an interest in possession until it falls in.

If James Barbour had had a son who had died before the settlor and before the policy matured, no duty would have arisen on the death of James because the son never had an interest in possession, but on the submission of the bank duty would have been payable because he had an interest in possession.

If the life tenant could insist on the surrender of the policy and was entitled to the income from the substituted investments it would not be disputed that he had an interest in possession; alternatively, if the first life tenant was entitled to the income from the substituted investments, then it would be an interest in possession; that was the position in *Lord Advocate v. Hamilton's Trustees*,²⁷ for, although it was not actually said, it was implicit in the judgment. But where the trustees have no discretion to surrender the policies or would have to accumulate the moneys under a composition—there being no power under which the trustees could pay the income to the life tenant—then it is impossible to say that the first life tenant has an interest

in possession. [Reference was made to *Hill v. Trenery*²⁸ and *Beresford v Beresford*.²⁹]

In *Adamson v. Attorney-General*³⁰ Lord Buckmaster held that an interest which was liable to be defeated before the death of the settlor was an interest arising on the death of the settlor, and where a life tenant of a settled legacy died before the expiration of a year from the testator's death, and never became entitled to receive anything, no estate duty was payable on his death as it never became an interest in possession: see *In re Harrison*.³¹ In *Attorney-General v. Lloyds Bank Ltd.*³² no child had an interest in possession because of the necessity to accumulate, but after the death of each child had an indefeasible interest: see the argument of Sir Thomas Inskip.³² *Westminster Bank Ltd. v. Attorney-General*³³ is important from the Crown's point of view because the income of the investments was accumulated until 1942 but not after, and no claim therefore was made on the investments, only on the policies. That case supports the contention of the Crown that this interest did not arise in 1942, but on the death of the settlor.

The effect of *D'Avigdor-Goldsmid*³⁴ is that a policy of insurance is just like any other property, and the mere increase in value does not constitute an interest arising on the death; but where on the death a life interest falls into possession, that is a new interest which attracts duty under section 2 (1) (d). *Attorney-General v. Dobree*³⁵ was, having regard to *D'Avigdor-Goldsmid*,³⁶ wrong in holding that one must look to the policy moneys as opposed to the policy itself, but that case was not expressly overruled by the House of Lords; it is still a binding authority that where under the settlement of a policy a life interest takes effect on the maturity of the policy, that is an interest arising on the death: see also *Inland Revenue Commissioners v. Scott's Trustees*.³⁷ There is no interest in possession in settled property until it actually falls into possession, and there cannot be an interest in possession of a reversionary estate.

[HARMAN J. *D'Avigdor-Goldsmid*³⁸ says that in the case of a policy that is not so.]

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²⁸ (1856) 23 Beav. 16.

²⁹ (1857) 23 Beav. 292.

³⁰ [1933] A.C. 257; 49 T.L.R. 169.

³¹ [1918] 2 Ch. 374, 376.

³² [1935] A.C. 382, 386.

³³ [1939] Ch. 610; [1939] 2 All E.R. 72.

³⁴ [1953] A.C. 347.

³⁵ [1900] 1 Q.B. 442.

³⁶ [1953] A.C. 347.

³⁷ 1918 S.C. 720.

³⁸ [1953] A.C. 347.

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The effect of *D'Avigdor-Goldsmid*³⁸ is that a policy of insurance must be treated as being in the same position as any other property (with certain exceptions not here relevant). There no interest could arise on the death of the settlor and the position with regard to settled policies was left open. That must be determined on general principles and such authorities as are binding on this court. On the authority of *D'Avigdor-Goldsmid*³⁹ duty is leviable only if an interest does arise on the death; James Barbour took an interest in possession in the moneys on maturity; his interest was therefore one which arose on the death.

Geoffrey Cross Q.C. in reply. To succeed in this case the Crown must say that a new beneficial interest arose on the death of the settlor, and must establish (1) that the life interest of James Barbour in the policy was a deferred or expectant interest during the life of the settlor, and (2) that the coming into being of that interest was an "interest arising." In *Attorney-General v. Lloyds Bank Ltd.*⁴⁰ and *Adamson v. Attorney-General*⁴¹ interests originally defeasible became indefeasible.

The Crown argued that the right to possession connoted the right to receive income; that is a fallacy. No duty was payable in *D'Avigdor-Goldsmid*,⁴² and it cannot make any difference because the settlor has divided the beneficial interest between one person for life and then for another. The question for the purpose of the decision in this court is whether the interest of James was reversionary and was it held in suspense during the lifetime of the settlor. [Reference was made to *In re McKee*.⁴³]

The only case in which any court has approached the question of insurance policies on a proper basis and considered a life interest in the policy is the *Hamilton* case,⁴⁴ which was emphatically approved in *D'Avigdor-Goldsmid*.⁴⁵ *Westminster Bank Ltd. v. Attorney-General*⁴⁶ proceeded on admissions, and, as pointed out by Lord Morton in *D'Avigdor-Goldsmid*,⁴⁷ on the wrong basis as to policies. *Beresford v. Beresford*⁴⁸ and *Hill v. Trenery*⁴⁹ do not assist the Crown, as in those cases the husband had covenanted to keep up the policies.

The bank submit that if the policy moneys had come in before the death of the settlor they would have been payable to James Barbour. There is no provision for accumulation, express or

³⁸ [1953] A.C. 347.³⁹ *Ibid.*⁴⁰ [1935] A.C. 382.⁴¹ [1933] A.C. 257.⁴² [1953] A.C. 347.⁴³ [1931] 2 Ch. 145; 47 T.L.R. 424.⁴⁴ 1942 S.C. 426.⁴⁵ [1953] A.C. 347.⁴⁶ [1939] Ch. 610.⁴⁷ [1953] A.C. 347.⁴⁸ 23 Beav. 292.⁴⁹ 23 Beav. 16.

implied, and therefore the life tenant had an interest in possession even though he derived no benefit from it. The fact that the settled property is unlikely to produce or cannot produce any income does not affect the position; it can only be said that the life tenant is not in possession if there is a provision to accumulate.

Cur. adv. vult.

July 14. HARMAN J., having stated the facts, read the following judgment: The right of the Crown to duty under section 2 (1) (d) of the Act of 1894 in respect of life policies has recently been the subject of a decision in the House of Lords in *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*.¹ That decision considerably altered views previously held, and has finally decided that no claim arises under section 2 (1) (d) on the maturity of a policy on the life of A where the policy has been for over five years the absolute property of B. A perusal of the correspondence before the issue of the present proceedings led the plaintiff to conclude that the Crown distinguished the present case from that decision on the ground that the policy here was not the absolute property of James but was part of a settled fund in which he had a life interest. Thus the argument appeared to run: duty became exigible because James having survived the settlor became for the first time indefeasibly entitled to a life interest in the policy moneys, his interest having during the life of the settlor been liable to be defeated by his death. This seems to be an argument based on the decision of the House of Lords in *Adamson v. Attorney-General*,² in which four members of the House came to the conclusion that an interest in a fund which became indefeasible upon the death of the settlor in his children was liable to duty under section 2 (1) (d), although the same children had like interests in the fund before the death subject to an overriding power of appointment and the necessity of surviving the settlor. Lord Warrington said this after deciding that property did not pass by section 1 of the Act of 1894³: "It is still necessary to consider the alternative claim of the Crown under section 2 (1) (d). This section, unlike section 1, which deals only with property as a whole, brings within the ambit of the charge individual interests provided by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the

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¹ [1953] A.C. 347; [1953] 1 All E.R. 403.

² [1933] A.C. 257; 49 T.L.R. 169.

³ [1933] A.C. 277.

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"interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression 'property passing on the death of the deceased,' but only to the extent of the beneficial interest accruing or arising on the death of the deceased. Before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value if any of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under section 1 be charged with duty accordingly."

Lord Russell of Killowen in a dissenting opinion said this⁴: "In my view the beneficial interest in the whole fund passed, on the execution of the settlement, from the settlor as to two-fifths to his son John and as to three-fifths to his three other children then alive, subject in the case of each beneficiary to the possibility of his or her interest being taken away or otherwise affected by the exercise of the special powers reserved to the settlor, or by the occurrence of certain events in his lifetime. His death merely abolished this possibility and made the beneficial interests indefeasible. Or the matter may be put in another way, thus: the particular interest in the fund which was vested in each child immediately after the settlor's death was the same as it was immediately before the death, except that by the death it became indefeasible."

Accordingly, counsel for the bank opening the case was at pains to argue that the fact that the interest in the policy was not an absolute interest as in *Goldsmid's* case⁵ but a settled interest, made no difference. I confess that I was impressed by this argument and waiting to hear what answer the Crown would make to it, but counsel for the Crown, when he addressed me, took his stand on a narrower ground. He did not contend that if the interest of James Barbour in these policies was a life interest in possession during the lifetime of the settlor any claim for duty arose, but he argued that upon the true construction of the settlement James had no such interest. He rested his main

⁴ [1953] A.C. 277, 283.⁵ [1953] A.C. 347.

argument on the definition in clause (2), which I have read, under which the trust fund connotes the proceeds of the policies. These, he argued, did not fall in till the death of the settlor, and therefore the interest of James only arose at that date. In my judgment, this is not the true construction of the document. The interest of James, in my judgment, was a true life interest in possession, and the definition clause does not point only to proceeds falling in on the settlor's death, as is shown indeed by the fact that the sum payable on the drawing of a Victory Bond admittedly became part of the trust fund on its payment in the settlor's lifetime, and was invested for the benefit of the life tenant.

The Crown conceded, as I understood the argument, that if the income beneficiary under a settlement which includes a policy has the right to call on the trustees to realize the policy, then he has an interest in possession, and that the same result might follow if the trustees having a discretion to surrender the policy before maturity the life tenant had an interest in the surrender moneys, but it was said that if the trustees had a right to surrender, but either expressly or upon the true construction of the instrument there would be a duty to accumulate the income of the surrender moneys till the settlor's death, then there would be no interest in possession. It was pointed out that here there was no power to surrender the policy, and, indeed, it was provided by clause (2) that on the maturing of the policy the life tenant should have no right analogous to the kind of claim which succeeded in the case of *Roulls v. Bebb*.⁶

It was further argued that if, in the present case, the insurance society had been put into liquidation, any dividend received would have been directed by the court to have been accumulated till the maturity date. I do not accept this argument, nor, in my judgment, is it right to suggest that an interest cannot be an interest in possession where the subject-matter does not or cannot be made to produce income for the tenant for life. It is no doubt true that possession connotes the right to receive the rents and profits, if any there be, but, in my judgment, it does not follow from the fact that there are or can be no rents or profits that no one is in possession.

This would seem to conclude the matter unless there is authority binding on me to hold to the contrary. There was cited the case of *In re Harrison*,⁷ in which it was decided that where

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⁶ [1900] 2 Ch. 107.

⁷ [1918] 2 Ch. 374.

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the tenant for life of a settled legacy died within a year of the testator and, therefore, never became entitled to any interest, it did not pass on his death. That was an interest in possession in the sense that it was not reversionary, but Sargant J. decided that it was saved from duty under section 5 (3) of the Act of 1894 because it failed before it became an interest in possession. The reason, however, was that the interest in fact fell into the residuary estate by reason of the law that interest only runs one year from the death, so that, in effect, other persons and not the legatee were entitled to the income and were in possession of it. This seems to me to be not at all analogous to the present case.

I was pressed with the authority of *Attorney-General v. Dobree*,⁸ which was not expressly overruled in *Goldsmid's case*,⁹ as appears from Lord Morton's speech, where he said this: "*Dobree's case* ¹⁰ differs from the present case, for neither the wife nor her legal personal representatives could take anything unless she survived her husband, whereas in the present case it was certain, from 1934 onwards, that the appellant or his legal personal representatives would take the whole of the policy moneys, whether or not he survived Sir Osmond. It may be necessary to decide hereafter whether this difference was enough to justify the decision in *Dobree's case*.¹⁰ For the moment I would only observe that both Darling J. and Channell J. appear to have thought that the 'other interest' provided by the deceased was the sum paid by the assurance company on the death of the deceased and not the contractual right conferred by the policy. With this view I cannot agree."

The decision in *Dobree's case* ¹⁰ was, of course, wrong so far as it decided that duty was payable on the principal value and not on the life interest of the wife, but it was argued that for the rest it remained an authority binding on me to hold that the life interest in the policy did accrue or arise upon its maturity. It is to be observed that Mr. Haldane's argument in *Dobree's case* did resemble the argument of the taxpayer here, because he said ¹¹: "It is also submitted that the case does not fall within subsection (1) (d). No beneficial interest passed from the deceased to the wife or her trustees on his death. No beneficial interest accrued or arose on his death; it arose or accrued on the making of the settlement." And this

⁸ [1900] 1 Q.B. 442; 16 T.L.R. 80.⁹ [1953] A.C. 347, 368.¹⁰ [1900] 1 Q.B. 442.¹¹ *Ibid.* 447.

argument was not accepted, Darling J. relying largely on section 15 of the Act. In that case, however, the settlor kept up the policy during his life and there was no settlement of anything but the moneys to be received under the policy on his death, and all that the court was looking at was these moneys in which no interest in the wife arose or accrued except on the husband's death. Thus, the court did not consider as the subject-matter of the settlement the contract of insurance, but only its fruits, and it is this way of looking at such a transaction which was declared to be wrong in *D'Avigdor-Goldsmid's* case.¹² I cannot see that *Dobree's* case¹³ can stand as binding in the circumstances.

*Westminster Bank v. Attorney-General*¹⁴ does not assist because the trustee there admitted that it was accountable under section 2 (1) (d), taking the view of the law prevalent before *Goldsmid's* case,¹⁵ and the relevant question was whether duty was payable under section 1 or section 2 (1) (d).

I was also pressed with *Inland Revenue v. Scott's Trustees*.¹⁶ There again it was not disputed that section 2 (1) (d) would apply to the policy moneys—see Lord Cullen's opinion.¹⁷ In that case the trustees had a discretion to surrender the policy which they did not exercise, but it was nevertheless conceded that section 2 (1) (d) would have applied but for other circumstances. This, again, seems inconsistent with the decision in *Goldsmid's* case.¹⁸ The case was noticed by Lord Morton in his speech in that case, where he expressed the preference for the doubts expressed by Lord Sands of the correctness of the view¹⁹: "In *Inland Revenue v. Scott's Trustees*²⁰ the Inner House had to consider "the terms of a settlement of policies by a father upon somewhat "unusual trusts for the benefit of his daughters and their issue. "The facts differed widely from the facts of the present case, "and need not be set out at length, but I share the doubts "expressed by Lord Sands as follows²¹: 'These policies "belonged, after the creation of the trust, to certain trustees "for behoof of certain beneficiaries. Now, no doubt when a "man dies who has insured his own life the policy upon his "life is part of his estate, and in respect of that part of his "estate a beneficial interest accrues to his executors. But I

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¹² [1953] A.C. 347.¹⁷ *Ibid.* 722.¹³ [1900] 1 Q.B. 442.¹⁸ [1953] A.C. 347.¹⁴ [1939] Ch. 610; [1939] 2 All E.R. 72.¹⁹ *Ibid.* 371.²⁰ 1918 S.C. 720.¹⁵ [1953] A.C. 347.²¹ *Ibid.* 726.¹⁶ 1918 S.C. 720.

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“ ‘confess I entertain some doubt as to whether, where one
“ ‘already holds as one’s own property a policy of insurance on
“ ‘the life of another party, any beneficial interest that was not
“ ‘in the holder before accrues to him at the time of the death
“ ‘of the person whose life is insured. The policy which he had
“ ‘in bonis simply matures.’ ”

On the taxpayer’s side there was cited *Lord Advocate v. Hamilton’s Trustees*.²² As to that case, Lord Morton observes in *Goldsmid’s* case²³: “ ‘Lastly I come to *Lord Advocate v. Hamilton’s Trustees*.²⁴ In that case the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to become absolutely entitled on attaining the age of 25 and the daughter’s share was settled on her for life with remainders over. The trust deed stated that these provisions in favour of the children ‘shall vest in them respectively at the date hereof.’ The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased’s death, duty was claimed under section 2 (1) (d) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary (Lord Keith) on the grounds (1) that in the circumstances ‘the property sought to be charged had not been provided by the deceased,’ and (2) ‘that there was no beneficial interest accruing or arising on the death of the deceased, in respect that the whole interest in the policies had passed to the beneficiaries 24 years before the truster’s death, their interest having fully vested.’ . . . Lord Keith used language which applies very aptly to the present case. He said²⁴: ‘In the present case, it is undoubted that an interest vested in the beneficiaries under the deed of trust at the date thereof, and the death of the truster made no difference to that interest. If the sons had predeceased their father, their shares of the proceeds of the policies would have been paid over to their executors. I have difficulty in seeing how a beneficial interest accrued or arose to them, by survivorship or otherwise, on the death of the deceased. What accrued to them or to the trustees was a present right to demand payment from the insurance company in respect of a previously existing beneficial

²² 1942 S.C. 426.

²⁴ 1942 S.C. 426, 434.

²³ [1953] A.C. 347, 373, 374.

“ ‘interest.’ ” Lord Morton adds ²⁵: “ I agree with the reasoning “ which I have just quoted.”

So far as the case concerns the interests that the three sons took in the settled policies, it was clearly approved in *Goldsmid's* case,²⁶ but there was also a daughter who took not an absolute but a settled interest and it was not suggested that this made any difference. This, therefore, is in this respect a decision covering the present case, but it was contended that the court was only looking at the absolute interest of the sons and not at the settled interest of the daughter, and that her case was included *per incuriam*. The report does lend some colour to this suggestion. However that may be, the result of the case was that which the taxpayer here claims to be the right one and it is, at least, not a decision against that view.

The cases on this subject have been so lately fully reviewed in the House of Lords that it would not be useful for me to discuss them further. I am of opinion that on the concession made by the Crown I must decide this case in favour of the taxpayer. I should perhaps add that counsel for the taxpayer desired to reserve the right to argue in a higher court, if necessary, that policies of insurance which are dealt with expressly by section 2 (1) (c) of the Act of 1894 do not properly come within the mischief of section 2 (1) (d). That point is admittedly not open to this court and I say no more about it. There will be a declaration that in the events that have happened no estate duty is payable.

Declaration accordingly.

Solicitors: *Parker, Garrett & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

²⁵ [1953] A.C. 374.

²⁶ [1953] A.C. 347.

In re BETTINSON'S QUESTION.

[1955 B. 2698.]

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Husband and Wife—Property—Proceedings under the Married Women's Property Act, 1882, s. 17—“ Possession ”—Foreign domicile—Residence within the jurisdiction—Chattels removed by wife from husband's possession—Money withdrawn from joint account—Husband's claim for return of chattels and account of money—Community of property under law of domicile—Husband entitled to management and control—“ Possession ” included—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

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A husband and wife who were both American citizens possessing a Californian domicile were at all material times resident within the jurisdiction. By January, 1955, the parties had separated; and in April, 1955, the wife removed a number of chattels from the husband's possession. In May, 1955, she withdrew two sums of money from the joint banking accounts at two American banks. The husband took out the present summons under section 17 of the Married Women's Property Act, 1882, asking for an order for the return of the chattels and for an account and inquiries in respect of the two sums of money.

It was not in dispute that the Californian law as to community of property applied to both parties. By article 172 of the Californian Civil Code the husband is given the management and control of the community personal property. It was contended for the wife that the court had no power to make an order under section 17 of the Married Women's Property Act, since no question arose as to title to or possession of property within the meaning of that section, but only as to the management and control of property:—

Held, that the right to manage and control property must include the possession of it—either physical possession or a degree of control enabling the husband to say what was to become of it; the objection to the jurisdiction therefore failed and the husband was entitled to the order for which he asked.

Tunstall v. Tunstall [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310 distinguished.

ADJOURNED SUMMONS.

By this summons dated June 28, 1955, Ralph Gilbert Bettinson asked for the determination under section 17 of the Married Women's Property Act, 1882,¹ of certain questions relating to property on the ground that there existed between him and his wife, Josephine Bettinson, questions as to the possession of that property within the meaning of the section. He claimed for the return of certain chattels, which included various documents and a motor-car, which the wife had removed from his possession in April, 1955; he also asked for an account and inquiries in respect of two sums of \$6,500 and \$11,600 which the wife had had withdrawn on May 9 and 10, 1955, respectively, from two banks in America, and transferred to London. The circumstances in which the wife took possession of those chattels and money is set out in the judgment.

¹ Married Women's Property Act, 1882, s. 17: "In any question "between husband and wife as to "the title to or possession of pro- "perty, either party . . . may apply "by summons or otherwise in a sum- "mary way to any judge of the

"High Court of Justice in England "or in Ireland, according as such "property is in England or Ireland " . . . and the judge . . . may make "such order with respect to the "property in dispute . . . as he shall "think fit: . . ."

The husband and the wife, who were citizens of the United States of America, were married in December, 1942, in the city of Texas, but it was accepted that the matrimonial domicile was in the State of California.

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The husband, who was a scenario writer, was resident within the jurisdiction, being the tenant of a maisonette at Cadogan Place, London, where he lived in order to be within reasonable reach of his work at Elstree. The respondent wife was also resident within the jurisdiction, and, so far as was known, her last known address in the jurisdiction was in London.

The husband and wife separated in January, 1955, owing to matrimonial differences, and on June 2, 1955, the husband commenced proceedings for divorce in California.

A preliminary point was taken on behalf of the wife that as the domicile of the parties was Californian, where the doctrine of community of property obtained, the court had no jurisdiction to make the order sought under the Married Women's Property Act, 1882.

Edward Morrison for the wife. Notwithstanding that the property is in this country the court has no jurisdiction to make the order under section 17 of the Act for which the husband asks, having regard to the relevant section of the Californian Civil Code.

[WYNN-PARRY J. I should not have thought that any order that I would make about the money would conflict with the jurisdiction of the Californian court; I would only find that it was community property, and direct that it be set aside to await the order of the Californian court.]

The wife relies on her rights under Californian law. The doctrine of community of property is derived from Roman law through Spanish law; it bears no analogy to any common law principle. All property acquired after marriage by either husband or wife—with certain exceptions not here relevant—is community property. The possession of property by either spouse during the existence of the community is subject to a presumption—but not an irrebuttable presumption—that it is community property. The onus of proving that such property is not community property lies on the party asserting that it is separate property: *Meyer v. Kinzer*.² By article 172 of the Californian Civil Code the management and control of the entire community of property is vested in the husband, who may not dispose of it without the wife's

² (1859) 12 Cal.Rep. 247.

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written consent; he is in the position of a trustee in respect of that property: *Fields v. Michael*.³

The husband is claiming that questions exist under section 17 of the Married Women's Property Act between himself and his wife as to the title and possession of this property. It is conceded that no question arises as to title. The term possession in English law is the subject of numerous judicial dicta: see *The Tubantia*,⁴ *per* Sir Henry Duke.⁵ The right of the husband under Californian law is not possession in that sense, but only to management and control. No question as to possession within the meaning of section 17 can therefore arise here. Moreover, the property being no longer in the possession of the husband, section 17 is not an appropriate remedy: *Tunstall v. Tunstall*.⁶

D. A. Thomas for the husband. Management and control is a form of possession. There is more than one form of possession, and here it would clearly embrace management and control. The rights of the husband and wife to each other's movables are governed by the law of the matrimonial domicile: Dicey's Conflict of Laws, 6th ed., p. 795, rule 171. The husband's right under Californian law to management and control would not exclude questions as to possession of property under section 17.

*Tunstall v. Tunstall*⁷ does not apply to the present case. There was there no identifiable property on which an order of the court could operate. Had this property been disposed of or dissipated, that would be another matter, but the court can order an inquiry into what has happened to the money. Here there is identifiable property on which the order of the court can operate, and it appears from *Tunstall v. Tunstall*⁷ that in such circumstances an order under section 17 would lie.

WYNN-PARRY J., having stated the issues, continued: Under the law of the State of California, the doctrine of community of property obtains as regards these spouses. With the extent of that community of property I am not concerned on this summons, but I have had the benefit of expert evidence both in affidavit form and orally on cross-examination.

The relevant aspect of this community of property for the purposes of this application is that by article 172 of the Californian Civil Code the husband has the management and control of the personal property subject thereto with the like

³ (1949) 205 Pac.Rep. 2d. 402.

⁴ [1924] P. 78; 40 T.L.R. 335.

⁵ [1924] P. 78, 89.

⁶ [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310.

⁷ [1953] 1 W.L.R. 770.

absolute power of disposition (other than testamentary) as he has of his separate estate, with, however, the qualification that he cannot make a valid gift of that property or dispose of it otherwise than for valuable consideration without the written consent of his wife. It is clear, therefore, that the husband is given a very considerable degree of management and control.

There were two sums of money standing to the credit of joint accounts in the names of the husband and wife in two banks in Hollywood; these sums amounted to \$11,650 and \$6,580 respectively. The wife had the authority of the husband to draw on those accounts, which represented savings made by him out of moneys earned by him since the date of the marriage, and, therefore, subject to the doctrine of community of property.

According to the husband's evidence, which I accept, there was a meeting on January 31, 1955, at the offices of solicitors in London, where the husband and wife agreed that, pending the resolution of their matrimonial disputes, they would keep the community property intact, and that neither of them would draw on the savings accounts. The wife, however, procured her sister to withdraw, in the following May, \$11,600 from the first account and \$6,500 from the second account, and to send those two respective sums of dollars to her in London.

The husband had a Ford Zephyr motor-car which, on April 22, 1955, he took to be serviced at a garage in London. Later in that day the wife took the car away from the garage and has since refused to return it. For the purpose of this application, I treat that car as being part of the community property.

The third step taken by the wife was that, on Saturday, April 30, 1955, when the husband was away from his flat, she went there, saw his housekeeper and disclosed who she was; she procured the housekeeper to hand over the keys and took from the flat a number of articles, consisting of various papers, a diary, a judgment in favour of the husband, and similar items.

The husband now asks that the specific items of personal property, other than the proceeds of the withdrawals from the two American banks, should be returned to him, even on the basis that they form part of the community property, on the ground that, insofar as the Californian law is relevant to be considered, he is by that law given the management and control of the community property, and, obviously, he cannot exercise that management and control without possession of the papers and documents.

Moreover, it is clear that some of the items are entirely

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personal to him, such, for instance, as his diary for the year 1954. As to items of property falling into that category, the expert who gave evidence was categorical that a Californian court, if seized of an application by the husband against the wife for that purpose, would order the return of such property by the wife to the husband.

Further, the husband asks that, as regards the proceeds of the withdrawals from the two American banks, there should be an inquiry as to what part of those sums or the proceeds thereof is now in the possession or under the control of the wife, and a further inquiry as to what, if any, property now in her possession or control was acquired by her, or on her behalf, directly or indirectly with those sums of money, or any part of those sums of money. And finally, an order that the wife should place to the credit of the joint accounts of the husband and wife at those banks, or such other banks as this court may direct, with a view to preserving the position until the resolution of the matrimonial proceedings in California, such part of those respective sums as may, pursuant to the inquiries to which I have referred, be found to be in the possession or under the control of the wife.

The husband asks, therefore, that orders may be made in this matter to preserve the position pending the decision of the Californian court as to what is to happen to the community property.

Such an application, in the circumstances, appears to me to be founded on the clearest principles and reasons of common sense, and on the basis that I have jurisdiction to make such an order, I should decide to do so; but it is said that on the true construction of section 17 of the Married Women's Property Act, 1882, I have no jurisdiction to make any such order, because under the law of the matrimonial domicile the doctrine of community of property applies to the spouses.

It is pointed out that section 17 opens with these words: "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland . . .", and it is said that, in this case, there is no question as between the husband and wife either as to title or possession. It is not disputed on behalf of the husband that no question as to title is involved on this summons; but it is, of course, asserted that very real

questions as to possession exist between the parties. Mr. Morrison's argument amounts to this, that as the Californian law as to community of property applies, and as under that law the most which is conferred on the husband is the right to manage and control the property which is subject thereto, no question of possession, as that word is used in section 17, can arise.

I cannot accept that argument. I do not see anything in the context of section 17 to cut down the meaning of the word "possession," which, as has been said by the courts again and again is, *prima facie*, a word of very wide import.

If a man is given the right by the relevant law—and I treat the law of California for this purpose as being the relevant law—to manage and control the whole of the property subject to the community of property, then he must be entitled to possession of that property, either to physical possession or to such a degree of control as will enable him effectively to say what is to happen to that property.

That degree of control is given to the husband by the law of California, and, in my judgment, therefore, there is no substance in the argument that I have no jurisdiction to entertain this application because no question as to title or possession arises.

Mr. Morrison relied on *Tunstall v. Tunstall*,¹ but that case, in my judgment, is wholly distinguishable from the present. It was held in that case that the proceedings were misconceived, because there was no property or identifiable fund on which an order under section 17 could operate, and it is perfectly clear that that was so on a short examination of the facts.

Here a number of items are identified, and as to the two sums of money, it is not possible to pronounce on their fate until an inquiry has been held, and only after an inquiry has been held will one be able to postulate whether or not there is any identifiable fund on which an order under section 17 could operate.

It is clear from the judgment of Lord Goddard C.J. in *Tunstall v. Tunstall*² that, if it would have been shown that there was an identifiable fund of specified property, he envisaged that means of protecting the position could be taken, because he says, in the course of his judgment³: "To show how inappropriate was the order which has been made by the judge below one need only ask, how could it be enforced? If there were a sum of money which was in a bank, an order might have been

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¹ [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310.

² [1953] 1 W.L.R. 770.

³ *Ibid.* 772.

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“made upon the bank in appropriate proceedings to prevent the money being paid out; if the money had been in the hands of a solicitor he might have been called upon by the court to hold it. That would be one thing. But there is no means under section 17 of giving a money judgment. . . .” No money judgment is asked for here. Nothing more is asked for than that the necessary steps be taken to find out whether or not an identifiable fund exists on which a further order might be made under section 17.

The wife has denied in her affidavit that she took a number of the items of property referred to in the schedule to the summons. It was desired by those advising the husband to cross-examine her, but as soon as that became clear to her, she has, apparently, taken steps to make it impossible to serve her with the necessary order, and her whereabouts, as I am told, are unknown to her solicitors.

In those circumstances, I propose to prefer the oath of the husband, who, if he had been required for the purpose, would have been available to be cross-examined. I shall therefore proceed upon the basis that it is established to my satisfaction, on the evidence as it stands, that the wife took away from his flat in Cadogan Place the whole of the items specified in the schedule to the summons.

There is also before me a motion to discharge an order made by Roxburgh J. on July 22, 1955, by which he ordered the wife to bring into this court, or to the proper officer of this court certain items, with leave to apply to discharge that order if she so desired, on the basis, of course, that she could satisfy the court that she had not taken the items in question.

In the circumstances it will be better to discharge that order, because the order which I propose to make will cover the whole of the items. There will be an order directing the wife to deliver up to the husband the items specified in the schedule, and that will include the motor-car. I shall direct the inquiries asked for in respect of the sums withdrawn from the two banks in California. I shall direct that the wife shall pay the costs up to date in view of her behaviour, and the costs of the inquiry will be reserved.

Order accordingly.

Solicitors: *Bull & Bull; Rowe & Maw.*

I. G. R. M.

BAGETTES LTD. v. G. P. ESTATES CO. LTD.

[1955 B. No. 1670.]

1955
Oct. 14, 26.

Wynn-Parry J.

Landlord and Tenant—Act of 1954—Security of tenure—Application to tenants of premises sublet as flats—Whether subletting of flats a “business” within the Act—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2, c. 56), s. 23.

The subletting of parts of premises as flats with a view to making a profit from the rentals is not a business in respect of which the person carrying it on is entitled to security of tenure under Part II of the Landlord and Tenant Act, 1954.

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The defendants carried on the business of holding, managing and letting real property, in connexion with which they acquired and held the residue of a leasehold term expiring on March 25, 1955, of Nos. 99, 101 and 103, Gloucester Place, London, W.1, of which the plaintiffs were the landlords. These premises were divided into 13 flats, one of which was in the basement. Accommodation, the extent of which did not appear from the evidence, was also provided in the basement for a caretaker, and a caretaker employed by the defendants was in occupation till March 25, 1955. There were also in the basement storerooms, used for the storage of cleaning materials, surplus articles of furniture, brushes, vacuum cleaners and other such articles. Fuel was also stored in the basement premises, where the boiler rooms were situate. The defendants were not obliged to provide their tenants with hot water nor to clean the common parts of the premises, namely, the hall, stairways, passages or landings; and the tenants had in respect of that part of the premises under the terms of their leases, only the right of user in common with the defendants. However, the defendants, for the purpose of the better running of their business, provided hot water and cleaned the common parts of the premises so as to make the premises more attractive to their existing and prospective tenants.

At all material times 10 flats were occupied by tenants of the defendants, and were still so occupied. The defendants had, on February 22, 1955, and still had, vacant possession of flat No. 3, and since March 25, 1955, they had had vacant possession of flat No. 4. Possession of flat No. 18 was taken by the plaintiffs from the defendants' tenant on March 25, 1955.

The defendants asked for a new tenancy of the whole of the

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premises; the plaintiffs refused to accede to that request, and in consequence an application was made by the defendants under the Landlord and Tenant Act, 1954, asking for an order under section 24¹ of the Act.

The plaintiffs contended that the defendants had not, on the facts, a tenancy to which Part II of the Act applied; and by the present summons they asked the court to determine whether, on the true construction of the Landlord and Tenant Act, 1954, the defendants had a tenancy of 99, 101 and 103, Gloucester Place, to which Part II of the Act applied.

L. A. Blundell for the plaintiffs. If section 23 of the Landlord and Tenant Act, 1954, were construed so as to include a business of this nature, it would lead to a nonsensical result. Section 17 of the Landlord and Tenant Act, 1927, expressly excluded the letting of flats, and the question is whether Parliament intended to alter the law by omitting that provision, or whether the Act of

¹ Landlord and Tenant Act, 1954, s. 23: "(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes. (2) In this Part of this Act the expression 'business' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate. (3) In the following provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

S. 24: "(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act;

and, subject to the provisions of section 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act."

S. 32: "(1) Subject to the next following subsection, an order under section 29 . . . for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order. (2) The foregoing provisions of this section shall not apply in a case where the property comprised in the current tenancy includes other property besides the holding and the landlord requires any new tenancy ordered to be granted under section 29 of this Act to be a tenancy of the whole of the property comprised in the current tenancy. . . ."

1954 introduced a new requirement—occupation—which rendered the provisions of section 17 unnecessary. The court must therefore determine whether a company which holds a lease like this, and carries on the activity of letting the flats in the building, but not from an office in the building, is within Part II of the Act. Two points of construction arise: (1) Are these premises occupied within the meaning of section 23 (1)? (2) If so, is the occupation for the purposes of a business as indicated by the next following subsection? The defendants contend that the flats which are not let are in their occupation; but that is not occupation within the meaning of the Act. Their strongest case for occupation within Part II of the Act is in respect of the basement, which is used for storage and boilers, and the staircases and passages, which are used by the tenants of the flats in common with the defendants. There is a positive use of these parts of the premises, but even that does not constitute occupation for business purposes within the intention of the Act; the court must find that the defendants are actively carrying on a business on the premises for them to come within the Act.

The defendants' claim is that they occupy these premises for the purposes of the business carried on by them, and if this were right their occupation would be within the Act and their request for a new tenancy would be a good one. That tenancy would be limited to the "holding" as defined in section 23 (3), i.e., the basement and the common parts of the building such as the staircases and passages, but such a construction would amount to an absurdity, and the courts will construe a statute so as to avoid an absurdity or illogicality. The Act should be limited to occupation of premises which are used for the carrying on of a business in the ordinary sense.

Desmond Ackner for the defendants. The defendants want a lease of the whole of the premises, which the court has jurisdiction to grant with the consent of the landlords. The so-called absurdity suggested to the court is in *terrorem*.

[WYNN-PARRY J. The strongest way of pointing out a wrong construction is often by showing its absurdity.]

These consequences are not inevitable; it lies in the landlords' power to avoid the absurdity.

If a tenant can show that any part of the property comprised in the tenancy "is or includes premises" which, as provided by section 23 (1), are occupied by them and so occupied for business purposes, then Part II of the Act applies. "Occupation" means legal possession plus some use. It is sufficient for the tenants to

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show that a part of the premises, however small, is occupied by them for the purposes of their business; here the rooms in the basement and the staircases and passages are occupied by the defendants. Occupation need not be physical: *Liverpool Corporation v. Chorley Union Assessment Committee and Withnell Overseers*,² where the word is used in connexion with rating. The question is whether these particular parts of the premises are occupied by the defendants for the purposes of their business within the meaning of the Act. This Act is designed to have the widest possible effect; section 17 of the Landlord and Tenant Act, 1927, expressly excluded persons who sublet their premises as residential flats, but section 23 of the Act of 1954 is clearly apt to cover this use.

The meaning of "carrying on a business" was discussed in *Smith v. Anderson*³ at first instance by Sir George Jessel M.R. The management and letting of flats involves the supply of certain services, and it is clear that the defendants, by providing these amenities on the parts of the premises admittedly occupied by them, were doing so for the purposes of their business. It is irrelevant that they do not run their office from the premises; it is enough if the parts of the building occupied by them are occupied for the purpose of their business of letting and managing flats.

Blundell in reply. The purpose of Part II of the Act is to give security of tenure to business tenants and to give them security on the premises on which they carry on their business. The defendants are seeking to extend the protection of the Act to a business which in reality is carried on elsewhere; the Act envisages a category of residential premises as distinct from business premises. To receive the protection of the Act the business must be carried on within the "holding," which is not the case here.

Cur. adv. vult.

Oct. 26. WYNN-PARRY J. read the following judgment: This summons raises a short but interesting question of construction of section 23 of the Landlord and Tenant Act, 1954. Section 23 appears in Part II of the Act under the fasciculus "Security of "Tenure for Business, Professional and Other Tenants."

[His Lordship having referred to the relevant sections of the Act, and stated the facts, continued:] The argument put forward

² [1912] 1 K.B. 270; 28 T.L.R.
 177.

³ (1880) 15 Ch.D. 247, 258, 259.

by Mr. Ackner for the defendants is a short and perfectly clear argument. He contends that in order that Part II of the Act should apply in favour of the defendants it is only necessary to find that some part of the premises comprised in the lease is in the occupation of the tenants, however small that part may be; and that the question whether or not the tenant could carry on his business on that part is irrelevant. The part of the premises, however small, which is in the occupation of the tenant must constitute "the holding" (section 23 (3)), and once it is shown that a holding exists, the tenant is entitled to have, and the court is bound to order, the grant of a new tenancy of that holding.

Applying that principle to the facts of this case, the holding in respect of which the defendants can ask for a grant would, it is argued, comprise at any rate the rooms in the basement, which are used for storage, and the stairs, landings and passage ways, which the defendants clean, light and heat. It might also include the flats and the rooms in the basement which are vacant, but it is conceded that it cannot on any view include the flats which are occupied by tenants of the defendants.

It is manifest that on such a holding, even including the flats and the rooms in the basement which are vacant, the defendants could not carry on the business, which up to the expiration of their contractual tenancy they were carrying on, namely, the business of letting off all the flats in the premises, and thereby making profits; nor, as a practical business proposition, could they carry on a business consisting of letting off the flats now vacant with any hope of making a profit.

I cannot regard the language of section 23 as being other than unfortunate. It would have been the simplest thing in the world to have introduced into Part II of the Act an express provision that it should not apply where the business consisted in sub-letting premises as flats, as was done in the Landlord and Tenant Act, 1927. Nevertheless, it is one of the basic canons of construction that, if possible, an Act of Parliament shall be construed so as to produce a sensible result.

In *Trevillian v. Exeter Corporation*¹ Kindersley V.-C. said²: "Now I have carefully gone through this Act of Parliament, and "to say that it might have been made more clear and precise "than it is, or even to say that there is at least one passage in "it which is absolute nonsense, is only to say of this Act what "I am afraid may be predicted of perhaps nine out of ten Acts

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¹ (1854) 5 De G.M. & G. 828.² Ibid. 831.

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“ of Parliament which come before the courts of justice for their
 “ consideration. Out of the terms of it, however, I have to
 “ collect, as well as I can, what the meaning of the legislature
 “ was.”

The construction which Mr. Ackner urged on me must produce an absurdity. The absurdity is even greater when one comes to consider the position of the flats now let. When the tenancies fall in, the plaintiffs will be entitled to possession of them. What are they to do with them? If they let them, what right to use the staircases, landings and passages will they be able to confer on their tenants, as *ex hypothesi* those parts of the premises form part of the defendants' holding and will be the subject of a grant to them under the order, which, on Mr. Ackner's argument, the court must make?

I put to Mr. Ackner during the argument that in truth all he could hope from success on this summons was to establish a nuisance value in subsequent negotiations with the landlord. With this suggestion he was constrained to agree.

I recoil at making an order which must result in an absurdity, but I do not think that I need make such an order. The heading of Part II of the Act is “ Security of Tenure for Business, “ Professional and other Tenants,” and the scheme of this Part of the Act, whatever the infirmity of its language, is that where a man occupies as tenant premises for business or professional purposes, he will not necessarily have to leave against his will at the end of his tenancy; but that, subject to the terms and conditions contained in the Act, he shall have the right to remain as tenant of those premises in order to enable him to occupy them for the purpose of continuing to carry on his business. It is no part of my intention to attempt any exhaustive statement of the businesses and professions which fall within or do not fall within Part II of the Act; it is enough for me to say that, in my judgment, on the view of the scheme of Part II of the Act, which I have expressed, the business of subletting parts of premises as flats with a view to making a profit from the rentals, is not a business in respect of which the person carrying it on is entitled to the form of protection, namely, security of tenure, which is the subject of Part II of the Act.

Mr. Ackner urged upon me that because the plaintiffs as landlords have the right under section 32 to insist that the grant ordered to be made should comprise the whole of the premises, it did not lie in the mouth of the plaintiffs to advance the submission that the defendants' argument must lead to an

absurdity. I cannot accept this reasoning. Section 32 gives the landlord a right, which he may or may not decide to exercise. He has a clear right to choose, and if he chooses not to exercise the right, he must nevertheless remain free to advance argument as to the consequences which necessarily follow as a result of that choice.

For these reasons I propose to declare that on the true construction of the Landlord and Tenant Act, 1954, the defendants have not a tenancy of the premises 99, 101 and 103, Gloucester Place, to which Part II of that Act applies.

Declaration accordingly.

Solicitors: *Harris, Chetham & Co.; Clarke, Square & Co.*

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In re PELLY'S WILL TRUSTS. RANSOME *v.* PELLY.

1955
Oct. 25.

[1955 P. 1344.]

Wynn-Parry J.

Settled Land—Improvement—From capital money—Application of capital money for authorized improvement—Whether tenant for life entitled to benefit of income tax allowance for improvement—Settled Land Act, 1925 (15 Geo. 5, c. 18), ss. 73, 107.

The tenant for life of an estate settled by will, in the course of occupying and farming it, carried out improvements falling within section 73 (1) (iv) of the Settled Land Act, 1925. The trustees took out a summons asking, *inter alia*, whether, in applying capital money for such improvements, on the assumption that it did not fall to be regarded for income tax purposes as the income of the tenant for life or a trade receipt of farming carried out by him, they were entitled to deduct out of the capital money relief from tax recoverable by the tenant in respect of the expenditure on improvements:—

Held, that, since a tenant for life exercising any power under the Settled Land Act, 1925, was, by virtue of section 107 of the Act, in the position of trustee for all parties entitled under the settlement, and must not therefore retain a profit made out of the settled property, in the application of capital money by the tenant for life on an improvement authorized by section 73 of the Act the trustees must deduct therefrom any income tax which had been, or might be, allowed for maintenance in respect of such improvement. Further, the tenant for life was under a definite obligation to make any claim for such allowance under the Income Tax Acts.

Dictum of Harman J. in *In re Sutherland Settlement Trusts* [1953] Ch. 792; [1953] 2 All E.R. 27 applied.

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Frederick Raymond Pelly, by his will dated February 22, 1940, and codicil thereto dated October 4, 1940, settled certain freehold property known as the Preshaw Estate on trust for the first defendant for life without impeachment for waste, with remainder in the events which had happened to the second defendant for life. The testator died on October 16, 1940. Since October, 1940, the tenant for life had been in occupation of Preshaw House and had farmed the land comprised in the Preshaw Estate. In the course of such occupation and farming he had carried out improvements which fell within section 73 (1) (iv) of the Settled Land Act, 1925.¹

On a summons taken out by the trustees for the determination of various questions of construction under the will of the testator, the question relevant to this report was whether on the true construction of the Settled Land Act, 1925, and in particular of sections 73 and 75 thereof, the trustees, in applying capital money in payment for an improvement authorized by the Act, were, on the assumption that the capital money so applied did not fall to be regarded for the purposes of the Income Tax Acts either as income of the tenant for life or as a receipt of the trade of farming carried on by him, entitled to deduct and retain out of the capital money so applied, money representing the whole or any and if so what part of the relief from income tax recovered or recoverable by the tenant for life in respect of the expenditure incurred or to be incurred by him.

¹ Settled Land Act, 1925, s. 73:
“(1) Capital money arising under
“this Act, subject to payment of
“claims properly payable thereout
“and to the application thereof for
“any special authorized object for
“which the capital money was raised,
“shall, when received, be invested or
“otherwise applied wholly in one, or
“partly in one and partly in another
“or others, of the following modes
“(namely):— . . . (iv) In payment as
“for an improvement authorized by
“this Act of any money expended and
“costs incurred by a landlord under
“or in pursuance of the Agricultural
“Holdings Act, 1923, or any similar
“previous enactment, or under custom
“or agreement or otherwise, in or
“about the execution of any improve-
“ment comprised in Part I or Part
“II of the 1st Schedule to the said

“Agricultural Holdings Act. . . .”

S. 75: “(1) Capital money arising
“under this Act shall, in order to its
“being invested or applied . . . be
“paid either to the trustees of the
“settlement or into court at the option
“of the tenant for life. . . . (2) The
“investment or other application by
“the trustees shall be made according
“to the direction of the tenant for life,
“and in default thereof according to
“the discretion of the trustees. . . .”

S. 107: “(1) A tenant for life . . .
“shall, in exercising any power
“under this Act, have regard to the
“interests of all parties entitled
“under the settlement, and shall, in
“relation to the exercise thereof by
“him, be deemed to be in the posi-
“tion and to have the duties and
“liabilities of a trustee for those
“parties.”

Denys Buckley for the plaintiffs, trustees of the settlement. Under section 107 of the Settled Land Act the tenant for life, in exercising any power under the Act, must have regard to the interests of all parties under the settlement, and in exercising any such power he is in the position of trustee: *In re Sutherland Settlement Trusts*.²

If the tenant for life under section 75 (2) of the Act directs expenditure of capital money in paying for an improvement under section 73 (1) (iii) or (iv) and recovers a rebate of income tax upon a maintenance claim in respect of such expenditure, he will if permitted to retain such rebate, increase his own expendable income by the amount of the rebate, thereby making a profit out of his power under section 75 (2).

D. H. McMullen for the first defendant, the tenant for life. Section 107 (1) of the Settled Land Act, 1925, provides that "a tenant for life . . . shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." In making a claim for maintenance relief in respect of repairs which qualify for that relief under the Income Tax Acts a tenant for life is not exercising any power under the Settled Land Act, but is exercising a right given to him as the person beneficially entitled to the income—the rents and profits—of the settled land. The reduction in his tax assessment which he obtains if the improvements which he has carried out qualify for maintenance relief is intended to be obtained, and is rightly obtained, by him for his own benefit. As a reasonable man he will do all he can to reduce his liability for tax, but he is not bound to do so. It is not suggested, and cannot be suggested, that the improvements carried out by this tenant for life were not advantageous to all parties entitled under the settlement. It is because such improvements are advantageous to all parties that provision is made by statute for the cost to be met out of capital. The tenant for life carried out the improvements in the well-founded expectation that they would be paid for out of capital.

The rule in *In re Pettit*,³ which has been applied in so many reported and unreported cases, is based on the principle that a person to whom an annuity of a fixed amount is bequeathed free

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² [1953] Ch. 792; [1953] 2 All E.R. 27. ³ [1922] 2 Ch. 765; 38 T.L.R. 787.

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of income tax is intended to receive the fixed amount free of tax and no more. It is for this reason that it was held in *In re Kingcome* ⁴ that the annuitant was a trustee of her right to recover for the benefit of the estate the tax overpaid in respect of her annuity, and was bound at the request of the trustees to sign a proper application for that purpose. The annuitant recovers a sum of money and must account for that sum to the trustees. The position of a tenant for life of settled land is entirely different; he is entitled to the income which may well vary from year to year.

In re Sutherland Settlement Trusts ⁵ was an entirely different case. The tenant for life was asking for recoupment of expenses which he had incurred without any expectation that they would be defrayed out of capital moneys. The observations of Harman J. ⁶ as to the duties of the tenant for life under section 75 of the Settled Land Act, 1925, should be read in the light of the facts of the case before him and in their context are no doubt a correct statement of the law. They do not, however, apply to the facts of the present case.

A. W. L. Franklin for the second defendant, tenant for life in remainder. The reasoning of Harman J. in *In re Sutherland Settlement Trusts* ⁷ is an important statement of principle and the ratio decidendi of that case: that principle should be applied here notwithstanding that the facts are different. If the tenant for life were to direct the application of capital moneys in improvements which he is not bound to repay and thus obtain repayment of income tax and surtax, he would be making a profit out of the trust property. It follows from the judgment of Harman J. in *In re Sutherland Settlement Trusts* ⁷ that a tenant for life who is making a profit out of the trust property cannot be acting as a trustee under section 107, and if he is not, then the Settled Land Act trustees must have a discretion, and the proper, and indeed the only, way for them to exercise it when making advances out of capital for improvements is to see whether, as here, the tenant for life is likely to get repayment of income tax and surtax from the Revenue by reason of the application of capital moneys in making improvements and to deduct such repayments.

Repayments of income tax can be made either under Schedule D to the Income Tax Act, 1952, on the footing that the improvements

⁴ [1936] Ch. 566; 52 T.L.R. 268;
 [1936] 1 All E.R. 173.

⁶ *Ibid.* 806, 807.

⁷ [1953] Ch. 792.

⁵ [1953] Ch. 792.

are a trading expense, or under Schedule A as a maintenance claim. Finally, the tenant for life must be accountable to the Settled Land Act trustees for any tax repayments allowed.

WYNN-PARRY J. The next question with which I am concerned on this summons raises an interesting problem which does not appear previously to have come before the court for consideration. The problem may be expressed in this way: suppose the tenant for life desires that capital moneys should be expended on an improvement being of such a nature as will not result in his being asked to repay the amount expended, and after the payment is made the tenant for life becomes entitled to put in a maintenance claim which results or would result in relief being given to him, is he to be regarded as accountable to the trustees for such part of the amount by which he benefits under the maintenance claim as is referable to the amount spent on the improvement?

As I have said, the question does not appear to be covered by authority, but it has been pointed out recently by Harman J. in *In re Sutherland Settlement Trusts*¹ that the effect of section 75 of the Settled Land Act, 1925, is that in giving a mandate to the trustees under that section the tenant for life is acting as trustee, and must have regard, as trustee, not only to the interests of himself and his assign, but to those of the remainderman. In that case the tenant for life made payment for the improvements without any expectation of being recouped. Subsequently, as a result of an alteration in the law, it was thought that he might be able to apply successfully for recoupment.

In the course of his judgment Harman J. said²: "It is said that it is not discretionary because the Duke has, in exercising his powers under section 75, directed the trustees to apply the capital money in this way; but, as I have already pointed out, the Duke, in giving that direction, was acting as a trustee for all parties, and I do not see how he can merely for his own convenience properly give a direction which puts money into his own pocket and the pockets of his assign in respect of farm-houses and other property which he is himself occupying, the repairs to which would be no good whatever to the inheritance. It seems to me that those are not directions which he can properly give as a trustee. He can ask the trustees whether they will pay, and they must have a discretion whether they

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¹ [1953] Ch. 792; [1953] 2 All E.R. 27. ² [1953] Ch. 806, 807.

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“ will or not; and, in my judgment, if that applied, they ought
 “ to decline, as they have done. I would come to the conclusion
 “ in this particular case, if the repairs be within the Schedule,
 “ and if the Duke purports to direct them to be done, that he is
 “ allowing his duty as a trustee, he having a duty towards the
 “ remainderman, to conflict with his interest, which is to have
 “ them done at capital expense in order that the tenant of the
 “ farm may be better off. I therefore think that it is not a case
 “ in which he can properly give such a direction.”

That passage, of course, is not directly in point in this case, but it appears to me that the underlying principle is one which ought to be applied in this case. Once it is appreciated that under section 107 of the Settled Land Act, 1925, the tenant for life, in exercising any power under the Act, is directed to have regard to the interests of all parties entitled under the settlement, and that in relation to the exercise of those powers he is to be deemed to be in the position and to have the duties and liabilities of a trustee for those parties, I do not see how he can consistently retain the benefit of the whole of the money spent on any improvement and the benefit of any maintenance claim which comprises the expenditure of those moneys. If he were allowed to do so, he would obviously be retaining a profit and, being a trustee, it is quite clear that he ought not to be allowed to do that. I think, therefore, that I should, in answer to this question, declare that he must be accountable for any money paid or allowed on a maintenance claim to the extent to which the money so allowed is referable to the money expended on the improvement.

I further take the view—and it must follow from the reasoning which has led me to the answer which I have given so far—that there is a definite obligation on the tenant for life to make the necessary maintenance claim whenever he is entitled to do so under the Income Tax Acts. If that were not the case it would leave the whole question to the whim of the tenant for life; but once it is appreciated that he is a trustee, I think that it is only logical that there should be imposed on him every obligation, the enforcement of which will bring into the hands of the trustees moneys which otherwise would not be brought in.

Order accordingly.

By the minutes of order as settled by counsel, it was declared:
 “ that upon the true construction of the Settled Land Act, 1925,
 “ and in particular of sections 73 and 75 thereof and upon the

“ assumption that such sum or sums as hereinafter mentioned
 “ do not fall to be regarded for the purposes of the Income Tax
 “ Act, 1952, or any amendment or re-enactment thereof either as
 “ income of the first defendant [the tenant for life] or as a receipt
 “ of the trade of farming carried on by him and are not repay-
 “ able out of the income of the settled land comprised in the
 “ said settlement the first defendant as such tenant for life as
 “ aforesaid ought to pay to the trustees of the said settlement or
 “ account to them for the amount of so much of any relief from
 “ income tax recovered or recoverable by him from time to time
 “ as is referable to any sum or sums paid by such trustees out of
 “ capital moneys of the said settlement for any improvement
 “ authorized by the said Act or as for such an improvement or
 “ referable to any expenditure by him which shall have been
 “ recouped to him by such trustees by the payment of any such
 “ sum or sums as aforesaid.” And it was further declared “ that
 “ the first defendant as such tenant for life as aforesaid ought at
 “ the request of the said trustees to make such claims and do
 “ such other acts and things as may be necessary to enable him
 “ to recover all such reliefs as aforesaid.”

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Solicitors: *Ashley, Tee & Sons; Fairfoot & Co.*

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In re ROYAL SOCIETY'S CHARITABLE TRUSTS.

[1954 R. 2734.]

 1955
 July 8,
 11, 18.

 Vaisey J.

Charity—Scheme—Jurisdiction to sanction—Single body of trustees of numerous charities—Separate trust funds—Application by trustees to combine funds into one fund—Application to enlarge scope of permissible investments — Jurisdiction of court to sanction such applications by way of scheme—Special jurisdiction confined to charities.

Trust and Trustee — Variation of trusts — Jurisdiction of Chancery Division—Permissible investments.

The Royal Society, as trustee of a number of charitable trusts possessing their own special trust funds, applied to the court for permission (a) to conflate and combine the trust funds in question into one combined fund or pool, in which the several trusts were to be deemed to be interested in appropriate aliquot shares; (b) to enlarge the scope of permissible investments for and in regard to such combined fund.

On the question whether the court had jurisdiction to make the order sought:—

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Held, that the court had, at the instance of trustees of charities, jurisdiction, where the Attorney-General, acting on behalf of the Crown as *parens patriae*, consented or did not object, to authorize such proposals as the present *by way of scheme*, and that in the circumstances the order would be made accordingly.

Per curiam: The court's jurisdiction to sanction such a scheme did not arise under section 57 of the Trustee Act, 1925, nor under the somewhat ill-defined scope of the court's general jurisdiction in respect of ordinary trusts, but was exercisable by virtue of the special position in law of charities. This jurisdiction, however, should be exercised sparingly, and not indiscriminately. It by no means followed that the range of investment ought to be widened as of course whenever a charity found that its available income was less than the trustee of it would wish, nor that the existence of a multiplicity of trusts under the administration of a single body of trustees ought in every case to be regarded as justifying a pooling of investments.

Attorney-General v. Sherborne Grammar School (1854) 18 Beav. 256; *Attorney-General v. Bishop of Worcester* (1851) 9 Hare 328 and *Andrews v. M'Guffog* (1886) 11 App.Cas. 313 considered.

ADJOURNED SUMMONS.

By this summons the Royal Society, as trustee of thirty-three charities possessing their own special trust funds, applied to the court for permission (a) to conflate and combine the trust funds in question into one combined fund or pool, in which the several trusts were to be deemed to be interested in appropriate aliquot shares; (b) to enlarge the scope of permissible investments for and in regard to such combined fund. Particulars of the charities were set out in a schedule to the summons.

The matter having come previously before Vaisey J., judge in chambers, it was adjourned into court for argument on the question whether the court had jurisdiction to make the order sought.

John Brunyate for the Royal Society. This application is brought (a) under section 57 of the Trustee Act, 1925, and also (b) by way of scheme. It raises the question whether the court has jurisdiction to make the order sought and, if so, whether it would be proper in the circumstances for the court to authorize so extensive a change as is contemplated in the constitution of these trusts.

As to the question of jurisdiction; it would appear to be doubtful whether the court has power under its general jurisdiction to sanction these proposals by way of scheme, for a scheme is normally made only where it is impracticable to carry on under

the existing trusts or in order to prevent grave loss or injury to the property or objects of the trust. The statutory jurisdiction conferred by section 57 of the Trustee Act, 1925, to sanction deviation from trusts is limited to matters connected with the management or administration of the trust property: see *In re Downshire Settled Estates*.¹ The present application comes within the limited ambit of the section, for the trustees' proposals are connected with the management and administration of the trust property. Further, it is to be noted that the section empowers the court to sanction trustees to invest generally.

The consolidation of the property of these trusts would involve a breach of trust, akin to the case of trustees, without authorization, investing in a contributory mortgage. The proposed consolidation is within the meaning and purpose of the expression "transaction" in section 57 of the Trustee Act, 1925.

If the court has, as is submitted, jurisdiction to make the order sought, it would in the circumstances of this case be a proper exercise of the jurisdiction for the court to sanction this application.

Denys Buckley for the Attorney-General. The court exercises over trusts an equitable jurisdiction. Charities occupy a special position, for the court has a wider jurisdiction in respect of charitable trusts than in the case of private trusts owing to the Crown's function in acting as *parens patriae* in matters relating to charity. The function of the Attorney-General, on behalf of the Crown, is to protect charities, and, accordingly, in cases where the consent of the Attorney-General is obtained, the court has jurisdiction to make orders varying or relaxing the strict rules of equity with regard to charitable trusts. In making such orders the court is not departing from the general rules of equity, for in respect of a private trust, where all the beneficiaries are *sui juris* and agree to the trustee taking a certain course, the court will sanction the proposal in question, for there is nothing which affects the conscience of the trustee.

[VAISEY J. What is the precise function of the court in these matters? Who has the last word?]

The court. The Attorney-General cannot bind his successors and therefore he requires the protection of the court. Moreover since the Attorney-General has more opportunity of investigating the facts and merits in the particular case, it is submitted that, except in unusual circumstances, the court would accept the views

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¹ [1953] Ch. 218, 243, 251.

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of the Attorney-General. [Reference was made to *Attorney-General v. Sherborne Grammar School*,² *Clephane v. Provost of Edinburgh*³ and *Andrews v. M'Guffog*.⁴] In *Attorney-General v. Bishop of Worcester*⁵ it was said that it is for the court to satisfy itself that the application made to it, if granted, is in the best interests of the charity. It would therefore appear that there is a general jurisdiction in the court to entertain such an application as the present.

Whether this scheme is desirable ultimately depends upon whether in this particular case this scheme (which would undoubtedly have advantages and conveniences) would in general be in the interests of all the trusts individually. They are not all constituted in the same way; under some the trustees have power to spend capital, in others only income. It is possible that small trusts with power to spend their capital might have a different policy from trusts in which there is only power to spend income and whose main interest is income. Also upon consolidation one is deprived of the opportunity of considering thereafter what is the best policy to pursue in the interests of each particular charity.

On the other hand, a pooling of the trust funds has advantages; for example, it simplifies the administration of the trusts and spreads the risk of depreciation. Moreover, there is statutory precedent for the order sought in the present application: see the Universities and Colleges (Trusts) Act, 1943, and "The Birmingham University Act, 1948" (11 & 12 Geo. 6, c. x).

Brunyate replied.

Cur. adv. vult.

1955, July 18. VAISEY J. read the following judgment: This is an application by The Royal Society (sometimes known as "The Royal Society of London for the Promotion of Natural "Knowledge") which was incorporated by a Royal Charter of His late Majesty King Charles II. Its celebrity is such as to absolve me from any necessity of either describing it or emphasizing its importance. In addition to its general corporate property it holds, as trustee under a variety of charitable trusts, a number of special trust funds, and the present application relates exclusively to those funds, and is made for two purposes which I think

² (1854) 18 Beav. 256, 280.

⁴ (1886) 11 App.Cas. 313, 316.

³ (1869) L.R. 1 Sc. & D. 417, 420,

⁵ (1851) 9 Hare 328, 361.

may be more conveniently dealt with in the reverse order to that in which they are raised in the summons. It is desired, in the first place, to conflate and combine the trust funds in question into one combined fund or pool, in which the several trusts are to be deemed to be interested in appropriate aliquot shares. In the second place, it is desired to enlarge the scope of permissible investments for and in regard to such combined fund. The question is whether those two objects are such as I have jurisdiction to authorize. The applicant is, as I have said, the Royal Society, and the respondent is Her Majesty's Attorney-General.

I will first consider the proposed consolidation of the trust funds. I am satisfied that the proposal is, on the whole, advantageous. It would simplify the administration of the trusts; it would spread over a larger area the risk of depreciation, and the advantage of possible appreciation; and the operation of such a pooling has, I understand, been adopted with success in schemes formulated under the Universities and Colleges (Trusts) Act, 1943, and by the private Act called "The Birmingham University Act, 1948" (11 & 12 Geo. 6, c. x). I am satisfied that in this particular case such a pooling of the trust investments is advisable, particularly in view of the small amounts of some of the funds to be pooled, and the only question is whether I have jurisdiction to authorize it.

The other proposal, namely, the extension of the permissible range of investment, is, I think, recognized as a method of correcting the ill effects of monetary inflation, and such extension, if carefully framed and judiciously utilized, possesses advantages which are, indeed, fairly obvious. I should like to give effect to this second proposal, if I can.

The case was put forward in the first instance as one which came within section 57 of the Trustee Act, 1925, or, alternatively, under the rather ill-defined scope of the courts' general jurisdiction. In my judgment, this matter does not come within the section at all, nor do I think that it is within the general jurisdiction of the court as exercised in relation to ordinary trusts. This matter must, in my opinion, be approached on the special ground that we are dealing here with charities.

Mr. Buckley, for the Attorney-General, reminds me that the Attorney-General, whom he represents here, stands for the totality of the beneficial interests under all and each of these trusts, and for that proposition he has called my attention to certain authorities.

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In *Attorney-General v. Sherborne Grammar School*¹ there is a passage in the judgment of Sir John Romilly M.R. which reads as follows: "The duties and authority of this court in dealing with matters of charity is not, I think, on this point, open to much doubt or question. This court has authority to redress a breach of trust, where the objects of the founder have been prevented or neglected. It has also authority to direct a scheme, in order to enforce"—by which I think he means "secure"—"the more complete attainment of those objects. This court has a further power and authority, when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the spirit of the original foundation, the actual compliance with which has become impossible. But it has no authority to vary the original foundation, and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even such as the court may surmise that the founder would himself have contemplated, could he have foreseen the changes which have taken place by the lapse of time."

Again, in *Attorney-General v. Bishop of Worcester*,² Turner V.-C. states that the Attorney-General "acts in these cases"—that is, in cases concerning charities—"on behalf of the Crown as parens patriae, and represents all the objects of the charity."

In *Andrews v. M'Guffog*,³ Lord Watson observed: "In the case of a public charitable trust the court have a power and discretion which does not belong to them in the case of a private trust. The rule is this, that while the court cannot alter the object of the trust, they may, according to the circumstances of each case, vary the mode of its attainment, although differing from the directions of the truster." And he cites *Clephane v. Lord Provost of Edinburgh*,⁴ in which the observations of Lord Westbury are in point.

Now, on this question of jurisdiction I have come to the conclusion that the court has, at the instance of the trustees, jurisdiction, where the Attorney-General consents or does not object, to authorize such proposals as the present *by way of scheme*. I emphasize those last four words. It seems to me that, although the Attorney-General does in a sense represent all the objects of the charity, he cannot act except with the authority

¹ (1854) 18 Beav. 256, 280.

² (1851) 9 Hare 328, 361.

³ (1886) 11 App.Cas. 313, 316.

⁴ (1869) L.R. 1 Sc. & D. 417, 420, 421.

of the court, and in practice it may be equally true that the court cannot act without the concurrence of the Attorney-General, to whose views it must always pay the closest attention. In the present case, Mr. Buckley has assisted the court by criticizing and commenting upon both the proposals which the applicants desire to have made operative, and subject, then, to any additions, embellishments or alterations which may be made by me in chambers, I propose, by way of scheme, to make an order in terms which I will presently mention. This is, however, in my view, an exceptional case. There is evidence that the Royal Society takes special care in selecting and varying its investments. Again, it by no means follows that the range of investment ought to be widened as of course whenever a charity finds its available income less than the trustees of it would wish. The existence of a multiplicity of trusts under the administration of one trustee ought not in every case to be regarded as justifying a pooling of investments. The jurisdiction which I hold that I have, should, in my judgment, be exercised sparingly, and not indiscriminately. The circumstances here are, to my mind, unusual. I have mentioned that some of the investments to be pooled are small; others are very large; and unless some kind of pooling is adopted the fair apportionment of the administrative expenses of the Royal Society in regard to these trusts must be a matter of difficulty. The order which I am about to make does not provide for two pools representing "Capital" and "Reserve" respectively (as was suggested), but for one only. The schedule to the order will be the same as the schedule to the summons, with any omission or addition which the Royal Society may arrange with the Attorney-General to make. I can do what the parties like about the costs. This is the order by way of scheme that I am prepared to make:—

SCHEME.

I. The investments and moneys representing the capital funds of the several trusts mentioned in the schedule to this scheme, together with the investments representing every or any other charitable trust of which the Royal Society may hereafter become the trustee (provided that such trust contains the necessary power to consolidate) shall be consolidated into one combined pool all of which investments and moneys as the same may from time to time be represented or constituted are hereinafter referred to as "the pool."

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II. Each of the trusts aforesaid shall be regarded and treated for all purposes as interested in an appropriate undivided aliquot portion of the pool.

III. For the purpose of settling adjusting and regulating the respective amounts for the time being of the aliquot portions of the respective trusts all necessary valuations and calculations shall be made and from time to time revised as circumstances may require by the Royal Society.

IV. Subject to the provisos hereinafter contained moneys in or arising from the pool and requiring investment may in addition to the range of investment authorized by the general law for the investment of trust moneys (hereinafter called "the authorized range") be invested in (i) government securities of the United States of America or of any State thereof or (ii) the debentures or debenture stock or preference ordinary or deferred shares or stock or other marketable security of any company incorporated in the United Kingdom under any general or special Act of Parliament or by Royal Charter or incorporated under the laws of the United States of America or any State thereof or of any corporation established in the United Kingdom for public purposes by or under any Act of Parliament *Provided first* that no funds shall be invested upon any investment not within the authorized range which is not dealt in or quoted upon a recognized stock exchange either in the United Kingdom or in the City of New York *Provided secondly* that no funds shall be invested outside the authorized range if the value of the investments in the pool which are within such range are then or would thereby become less than one third of the value for the time being of all the investments and money then in the pool *Provided thirdly* that no moneys shall be invested in any shares or stock of a company (other than a company incorporated in the United Kingdom carrying on banking or insurance business in the United Kingdom) which by reason of not being fully paid up or otherwise carry a liability to contribute by way of calls either in the event of the company being wound up or otherwise *And Provided fourthly* that no funds shall be invested in the ordinary or deferred shares or stock of any company unless at the time of investment such company shall have a paid-up capital of at least £750,000 or its equivalent at the current rate of exchange and so that in the case of a company having shares of no par value such paid-up capital shall be deemed to include the capital sum (other than capital surplus) appearing in the company's published accounts in respect of such shares.

If what I have read will suffice, the final order may here and now be made, or I will adjourn the matter to chambers for a scheme on the lines of what I have said to be perfected and approved.

Note.—The order was made in the terms set out above and directed that all costs both of the Royal Society and the Attorney-General should be taxed as between solicitor and client and paid out of the fund as a whole.

Solicitors: *Bristows, Cooke & Carpmael; Treasury Solicitor.*

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Revenue—Surtax—Total income—Annual payments—Deductions from total income—Maintenance payments to person out of jurisdiction ordered by foreign court—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 27, Sch. V, No. XVII, All Schedules Rules, Nos. 19, 21—Finance Act, 1927 (17 & 18 Geo. 5, c. 10), ss. 38 (2), 39 (3).

In 1929 the taxpayer, then resident and domiciled in the Netherlands, was divorced by his wife under a decree of a Dutch court which ordered him to pay annual maintenance of 34,500 guilders. He came to England in 1934 and remained here until 1940, and during these years duly paid the maintenance to his former wife in Holland, making the payments out of profits or gains brought into charge to British income tax. In respect of an assessment to surtax for the fiscal year 1937/38 he claimed to deduct the amount of the maintenance which he had paid in accordance with the Dutch decree. It was admitted that he was not entitled to deduct tax from the payment as against the wife:—

Held, that the taxpayer was not entitled to deduct the payment from his total income for surtax purposes under section 39 (3) of the Finance Act, 1927,¹ since that provision applied only where

[Reported by P. G. GALLICHAH, Esq., Barrister-at-Law.]

¹ Finance Act, 1927, s. 38 (2):
“The expression ‘total income’ in
“relation to any person means the
“total income of that person from all
“sources estimated, as the case may
“be, either in accordance with the
“provisions of the Income Tax Acts
“as they apply to income tax charge-
“able at the standard rate or in
“accordance with those provisions as
“they apply to sur-tax.”

S. 39 (3): “Where a person is
“required to be assessed and charged
“with income tax in respect of any
“property, profits or gains out of
“which he makes any payment in
“respect of any annual interest,
“annuity or other annual sum . . .
“he shall, in respect of so much of
“the property, profits or gains as is
“equal to the said payment and may
“be deducted in computing his total

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the payment was such that the taxpayer could have deducted tax under rule 19 of the All Schedules Rules of the Income Tax Act, 1918.

Observations in *Earl Howe v. Inland Revenue Commissioners* [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 289 and *Rossdale v. Fryer* [1922] 2 K.B. 303; 38 T.L.R. 445 applied.

APPEAL from the Special Commissioners for the purposes of the Income Tax Acts.

The taxpayer, who was resident and domiciled in the Netherlands until 1934, was divorced by his wife in 1929 under a decree of a Dutch court which ordered him to pay to his former wife annual maintenance of 34,500 Dutch guilders (equivalent to over £4,000). In 1934 he left Holland and came to England, where he resided until 1940, when he left for the United States. During his residence in England he duly paid the 34,500 guilders to his former wife in Holland out of profits or gains brought into charge to British income tax. His claim to have the payment allowed as a deduction in computing his surtax assessment for the fiscal year 1937/38 was disallowed by the Special Commissioners, and from this decision he appealed.

Roy Borneman Q.C. and *G. B. Graham* for the taxpayer. Prima facie the taxpayer is within the terms of the Finance Act, 1927, s. 39 (3),¹ and should not pay surtax on such part of his income as represents this payment. The decision of the Court of Appeal in *Earl Howe v. Inland Revenue Commissioners*² shows that a taxpayer is within section 39 (3) only if the annual payment is an annual payment within the terms of rule 19 of the All Schedules Rules of the Income Tax Act, 1918.¹ That case really decided that a deduction could not be claimed in the case of an

"income, be charged at the standard
"rate only."

Income Tax Act, 1918, All Sch. Rules, No. 19: "Where any yearly
"interest of money, annuity, or any
"other annual payment (whether
"payable within or out of the United
"Kingdom, either as a charge on any
"property of the person paying the
"same by virtue of any deed or will
"or otherwise, or as a reservation
"thereout, or as a personal debt or
"obligation by virtue of any contract,
"or whether payable half yearly or
"at any shorter or more distant
"periods), is payable wholly out of
"profits or gains brought into charge

"to tax, no assessment shall be made
"upon the person entitled to such
"interest, annuity, or annual pay-
"ment, but the whole of those profits
"or gains shall be assessed and
"charged with tax on the person
"liable to the interest, annuity, or
"annual payment without distin-
"guishing the same, and the person
"liable to make such payment . . .
"shall be entitled, on making such
"payment, to deduct and retain
"thereout a sum representing the
"amount of the tax thereon. . . ."

² [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 289.

annual payment which merely formed a part of the receipts of the recipient's trade and was not of itself income in the hands of the recipient, and the present case is therefore distinguishable. But it was said in *Earl Howe's* case² that a deduction could only be claimed in respect of an annual payment from which the payer could deduct income tax on behalf of the recipient. It is admitted, on the authority of *Keiner v. Keiner*,³ that the payer in the present case was not entitled to deduct income tax from the payment vis-à-vis the recipient, but, as was suggested in *Keiner v. Keiner*,³ this does not determine the payer's rights vis-à-vis the Crown, for, strictly speaking, the payer vis-à-vis the Crown was entitled to deduct income tax, and though, if he had done so, he could have been sued by the recipient, the recipient would have sued not for the deducted tax but for a sum equivalent to the amount of the deducted tax. If the recipient had come to live in England and accordingly had become subject to British income tax the payer might then have deducted income tax as against the recipient, and would then have been within the terms of section 39 (3); but it is clearly absurd to suggest that the place of the recipient's residence should determine the payer's liability to surtax. [Reference was also made to *Rhokana Corporation Ltd. v. Inland Revenue Commissioners*⁴ and *Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd.*⁵]

J. E. S. Simon Q.C. and *Sir Reginald Hills* for the Crown. Prima facie a taxpayer is chargeable with tax on all his income, and, with certain definite exceptions, his outgoings are irrelevant. *Earl Howe v. Inland Revenue Commissioners*⁶ shows that an annual payment may only be deducted for surtax purposes where that payment is taxable in the hands of the recipient by the payer deducting tax and so passing on the burden to the recipient. But in this case the payment was not so taxable in the hands of the recipient since she being resident abroad was not assessable to British income tax. [Reference was also made to *Rossdale v. Fryer*⁷ and *Solomon v. Inland Revenue Commissioners*.⁸]

HARMAN J. [after stating the facts:] It is true that the taxpayer's total income has been diminished by the sum of £4,000 or so; and it would seem just, therefore, that he should

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² [1919] 2 K.B. 336.⁵ [1920] 1 K.B. 539; 89 L.J.K.B.³ [1952] W.N. 139; [1952] 1 All E.R. 643; 34 T.C. 346.

252; 122 L.T. 547.

⁶ [1919] 2 K.B. 336.⁴ [1937] 1 K.B. 788; 53 T.L.R.⁷ [1922] 2 K.B. 303; 38 T.L.R.

494; [1937] 2 All E.R. 79; 21 T.C.

445.

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⁸ (1933) 18 T.C. 227.

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be able to deduct from his income that which is in truth a reduction of it. But it is said that, owing to the unusual circumstances and to the provisions of the law of income tax, that justice will not be done to him. That is the point which I have to examine.

It is purely a surtax point and the matter arises under the Finance Act, 1927, s. 38. That was when surtax was raised for the first time by way of substitute for its predecessor, super-tax; in section 38 (2) I find a definition of "total income" as follows: "The expression 'total income' . . . means the total income of that person from all sources estimated . . . in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate . . ." I leave out the words which do not seem to me to be relevant.

Section 39 (3) provides as follows: "Where a person is required to be assessed and charged with income tax in respect of any . . . profits or gains out of which he makes any payment in respect of any annual interest, annuity or other annual sum . . . he shall, in respect of so much of the . . . profits or gains as is equal to the said payment and may be deducted in computing his total income, be charged at the standard rate only." Therefore, surtax is not payable in respect of any annual sum which may be deducted in computing total income.

The question is whether this £4,000 is an annual sum which may be deducted in computing the total income of this man.

It is neither very easy to find how to arrive at total income nor what deductions may be made from it; the best I can do is to look at the Income Tax Act, 1918, s. 27: "(1) Any person who claims any . . . deduction shall, within the time limited by this Act . . . deliver to the assessor . . . a notice of his claim . . . setting forth— . . . (b) all particulars of any yearly interest or other annual payments, reserved or charged thereon, whereby his income is or may be diminished; . . ." I then turn to Schedule V to the same Act, which is the Schedule dealing with statements, lists and declarations. No. XVII is headed: "Declarations and Statements of Total Income." It contains three declarations, the third being "Declaration of the amount of . . . annual payments to be made out of the property or profits or gains assessed on the claimant . . ."

So far there does not appear to be much difficulty. This clearly is a payment to be made out of profits or gains assessed on the payer. His income is diminished by the £4,000 which he pays to his wife.

I must also turn to the All Schedules Rules of this Act, rule 19, which deals with cases where payments are made by a man out of his income already brought into charge to tax. That was the case here. The scheme is that the person obliged to make the payment is charged with the tax and the person entitled to the payment is bound to suffer that deduction, that being, of course, a very ordinary case. Rule 19 provides this: where an annual payment "is payable wholly out of profits or "gains brought into charge to tax, no assessment shall be "made upon the person entitled to such interest, annuity, or "annual payment, but the whole of those profits or gains shall "be assessed . . . without distinguishing the same, and the "person liable to make such payment . . . shall be entitled, on "making such payment, to deduct . . . a sum representing the "amount of the tax . . . "; and the payee is bound to suffer that deduction.

So, if this were a case of ordinary alimony by English law, the payer would undoubtedly be entitled to deduct the tax from the payment, and his former wife would be bound to suffer that deduction.

Similarly, under rule 21 of the All Schedules Rules, if the payment be made out of capital, and therefore not out of profits or gains brought into charge to tax, there is similar machinery for that, but the payer must then account to the Crown for the tax which he has deducted.

Therefore, so far, apart from authority, it would look as if this was a case where the deduction could be made, and where, therefore, when dealing with surtax, the relief under section 39 (3) of the Act of 1927 would apply. But it is said by the Crown that there is a line of cases which shows that no deduction can be made unless the payment is one from which the payer can deduct income tax under rule 19 and pass it on to the recipient, and that otherwise it does not rank as an annual payment within the section. It has been said in those cases that the only object of this method of collecting tax, of allowing a deduction, is to prevent double taxation, and therefore it applies only in the case where the recipient is a person 'himself liable to tax; and that if it be a payment made to a person not liable to tax that will result in some tax not being paid. That is an argument which may be true when applied to income tax, but it does not apply so well to surtax. For instance, it is true that if the appellant was allowed to deduct £4,000 from his total income he would not pay surtax on that sum. His former wife, not being

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liable to English taxation, will not pay it either. But supposing that she were liable to English taxation, she would not pay surtax on it at the same rate as he would have to pay on his income, so that the justice which is sought is not borne out by the result. However that may be, I must examine them to see whether they really do go to the length that the Crown alleges.

The commissioners' reasons given in the case are not altogether intelligible to me, and the Crown did not seek to support them or to rest its case upon them. I do not think that I need consider them any further.

It is clear that rule 19 may apply to payments made abroad. That is expressed in rule 19, and was pointed out by Lord Wright M.R. in *Rhokana Corporation Ltd. v. Inland Revenue Commissioners*.¹

It is admitted that in this case the payer, that is to say, the appellant, is not entitled as against his former wife to deduct tax. The reason for that is that the obligation to pay depends on foreign jurisdiction; the payee is not liable to English taxation at all, and is not therefore bound to suffer a deduction of this sort. That was clearly, I think, shown in the judgment of Donovan J. in *Keiner v. Keiner*.² That was not an income tax case except incidentally. A man sued his former wife for a declaration that, having to pay her alimony under a United States decree, and having deducted tax, he had satisfied his obligation. The judge held that was not so. He held that under the contract so called—it was not really a contract; it was an order of the court—the rule of law which applied was that of the State of New Jersey, and therefore rule 19 had nothing to do with it. Donovan J. said this³: “The question at issue “in this case is not what are Mr. Keiner’s rights and obligations “vis-à-vis the Inland Revenue here; the question is: What are “the rights and obligations of the parties inter se? These are “to be ascertained by referring to the contract between them; “. . .”—by that he means the order which, being a consent order, I suppose he might describe as a contract—“. . . in “other words, to the rules by which they have both agreed to “abide; and those rules are to be found in the contract itself as “governed by the law of New Jersey. It may well be that if “rule 21 applies to this payment—as to which I say nothing— “Mr. Keiner may find himself bound, vis-à-vis the Revenue

¹ [1938] A.C. 380; 54 T.L.R. 579;

[1938] 2 All E.R. 51; 21 T.C. 552,
573.

² [1952] W.N. 139; [1952] 1 All
E.R. 643; 34 T.C. 346.

³ 34 T.C. 348.

“ here, to deduct and pay over tax on the payment, and yet
 “ have to pay Mrs. Keiner in full. That is not her fault; it
 “ arises, if at all, because Mr. Keiner has chosen to come and
 “ live here.” Of course I accept that and so, indeed, does the
 appellant, but he points out that, in the view of Donovan J., the
 fact that he had to pay his former wife in full does not necessarily
 mean that he has finished with the income tax authorities.

The argument of Mr. Borneman, for the taxpayer, is this:
 that where a payment made is what is called a pure income pay-
 ment it ought to be treated as against the Crown as deductible,
 even though by the accident of the payee residing abroad it cannot
 be deducted against her. Postulating the possibility that the
 former wife came to reside in England, then it would seem that
 the payer could deduct the tax against her, because she would be
 a person liable to be taxed as a resident here; and if that were so,
 he could deduct the gross sum from his total income for surtax
 purposes. It seems that his right to make that deduction depends
 on where his former wife chooses to set up her domicile.

I must examine the cases on which the Crown relies to see if
 they go as far as is contended. The first is *Earl Howe v. Inland
 Revenue Commissioners*.⁴ In that case Earl Howe was making
 payments partly on account of mortgage interest and partly to pay
 the premiums on sinking fund policies taken out to replace the
 borrowed money on his death; and he claimed for super-tax pur-
 poses to deduct from his total income both those payments. It
 was agreed that he could deduct the mortgage payments, but it
 was said—and it is quite clear this was right—that the payments
 in respect of the policies were not true income payments at all.
 They were payments to make up a sinking fund; they were not
 income in the hands of the payee, which was the insurance
 company, or at any rate they were not income taxable as such,
 although they might be part of the profits of the company.
 Therefore, the decision was that Lord Howe could not make that
 deduction from his total income for super-tax purposes. The
 decision is, if I may say so, with great respect, manifestly
 right, but the expressions which the court used seem to me to
 go rather further than the case required. It was held that the
 amount paid annually by the appellant in respect of premiums
 on the life insurance policies was not an “ annual payment
 “ reserved or charged ” on his income within the meaning of
 section 164 of the Income Tax Act, 1842, which is the predecessor
 of the Act in question in this case.

⁴ [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 289.

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Swinfen Eady M.R., in the course of his judgment, said⁵:

“The contention on behalf of Earl Howe is that the annual premiums on the policies are ‘annual payments,’ and that they have to be made out of the profits brought into charge and are charged thereon. And they are charged on his income in this manner, that if he fails to pay the premiums in accordance with his covenant, his mortgagees have power to pay the same and resort to the security for what they shall so pay. It cannot be disputed that these annual premiums are, in one sense, annual payments; but the question is, are they annual payments within the meaning of section 164? The Inland Revenue Commissioners contend that no annual payment is within the section unless the payment is one in respect of which the person paying can deduct from it the income tax he may have paid in respect of it, and so pass on the burden of the tax to the recipient of the income. Of course premiums on life insurance must be paid in full to the assurance company, and no deduction therefrom on account of income tax is permissible. On the one hand interest, from which tax has been deducted, will form part of the income of the payee, and will have to be treated by him as part of his income. Unless the payer could deduct the interest from his income the result would be that such income would be subjected to double taxation. On the other hand premiums of life assurance paid to an assurance company are not subject to assessment as annual payments, although they doubtless form items in an account upon which the gains and profits of the assurance company for the year are to be arrived at.” The Master of the Rolls there came to the conclusion that within the true meaning of the Income Tax Act those were not annual payments.

Warrington L.J. was even more explicit, because he said⁶:

“In my opinion the annual payments referred to in section 164 . . . are those, and those only, which for taxation purposes are treated as income not of the payer but of the recipient, in respect of which the latter has to bear the duty.” Then he inquired, were those payments such payments, and answered “No.” “They are in truth instalments of purchase money for a capital sum payable on death.”

Then Scrutton L.J. expressed the same view. After rehearsing the sections he said⁷: “The result of these sections seems to be that the ‘annuities interest and other annual payments’

⁵ [1919] 2 K.B. 343.⁷ Ibid. 352, 353.⁶ Ibid. 347.

“ which can be deducted to obtain exemption are those from which the claimant can deduct tax on behalf of the recipient. Being in effect the profits of the recipient who bears the tax, they are not also to be treated as profits of the person paying them. If no tax can be deducted on behalf of the recipient, they cannot be treated as profits of the recipient, and must be treated as paid out of profits of the person paying, who is therefore to be taxed on them.” A little later he went on to say this: These premiums “ do not seem to me to be annual payments ejusdem generis with annual interest or annuities, and as income tax on them cannot be deducted against the recipient, I see no reason why the person paying should deduct them from his taxable income. To allow this would be to establish a kind of profits which would escape taxation in the hands of the person paying because he could deduct it as an annual payment; in the hands of the recipient because it did not represent his profits. From this point of view it is immaterial whether the payment is charged or not; it is not an ‘ annual payment ’ within section 102. . . .”

It will be seen, therefore, that the Court of Appeal was quite categorical that it would have been enough to say that the payments were not income payments at all in any true sense; that is to say, that it was not income in the hands of the recipient, and therefore the deduction could not be made. But I think that the court went further than that and did say that, unless one can make the deduction on behalf of the recipient, one cannot deduct it when it comes to dealing with surtax.

In *Rossdale v. Fryer*⁸ Scrutton L.J. affirmed his opinion. That was a case which again seems to me to be manifestly right. It was a case about Schedule A, and I need not, I think, go into the details of it. Profit rental escaped tax in those days, though it does not now. This was 1922, after the new Income Tax Act of 1918. Scrutton L.J. said this⁹: “ We had to consider ‘ in *Earl Howe v. Inland Revenue Commissioners*¹⁰ the limitations that ought to be put upon those words . . . ’—that is to say, the words ‘ yearly payments ’—‘ . . . because, as was pointed out in that case, and as I think is accepted here, it is not every yearly payment which you can deduct. Take the case put in *Earl Howe v. Inland Revenue Commissioners*.¹⁰ If you are paying a garage proprietor so much a year for letting

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⁸ [1922] 2 K.B. 303; 38 T.L.R. 445.

¹⁰ [1919] 2 K.B. 336; 35 T.L.R. 461; 7 T.C. 289.

⁹ [1922] 2 K.B. 312.

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“ you a car for four or five years, you cannot deduct from every payment that you make to the garage proprietor income tax on that payment. I do not desire to repeat (because having considered it again I think it is accurate) the view that I took in *Earl Howe v. Inland Revenue Commissioners*,¹⁰ which was to this effect, that if the sum from which you are deducting is properly taxable as part of the profits of the recipient you can deduct; if it is not so taxable you cannot deduct, but the amount must be treated as final.”

Therefore, I have to consider those emphatic expressions of opinion by members of the Court of Appeal. As I have said, it would otherwise be my inclination to say that where the money is income in the hands of the recipient a deduction can be made, even though the recipient happens, by reason of being outside the jurisdiction or for some other reasons, not to be liable to the English taxation system. But the section to which I come back again, section 39 (3) of the Act of 1927, has these words, “ and may be deducted in computing his total income.” It seems to me that I cannot get out of those words. This appellant may not deduct this payment from his total income. It is said that that is only true as against his wife, and not as against the Revenue. But having regard to the emphatic expressions of opinion in the *Earl Howe* case¹¹ and in *Rossdale v. Fryer*¹² that a deduction can only be made where the recipient is a person liable to English tax, I do not think that I am at liberty to take that view.

It seems to me to be very unfortunate for the appellant that the accident of his wife being outside the fiscal area should cause him to pay surtax on the £4,000, which he would not pay if she was within it. But there it is. These things do happen to people who change their domicile, as Donovan J. pointed out in the *Keiner* case.¹³ I do not feel, having regard to the decisions to which I have referred, that I am at liberty to say here that, although he cannot deduct against his wife, he can deduct for surtax purposes as against the Crown; and therefore, although not for the reasons which appealed to the commissioners, I think that they arrived at the right conclusion, and I must dismiss this appeal.

Appeal dismissed.

Solicitors: *Frere, Cholmeley & Nicholsons*; Solicitor of Inland Revenue.

¹⁰ [1919] 2 K.B. 336.

¹¹ *Ibid.*

¹² [1922] 2 K.B. 303.

¹³ 34 T.C. 346.

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SHERLOCK AND OTHERS *v.* ALLAN AND OTHERS.1955
July 6, 7, 11.

[1954 R. No. 1593.]

Evershed M.R.,
Jenkins and
Parker L.JJ.

*Charity—Public—Bequest “to the bishop for the time being of the
“diocese of the Windward Islands”—“To be used by him as he
“thinks fit in his diocese”—Whether valid charitable trust.*

Will—Construction.

A testator gave part of the residue of his estate “to the bishop
“for the time being of the diocese of the Windward Islands to be
“used by him as he thinks fit in his diocese” :—

Held, (1) that the gift was to the person for the time being
holding the office of bishop of the named diocese by virtue of that
office and was not a gift beneficially to the individual happening
to hold that office at the date of the testator’s death, and that,
accordingly, the bishop for the time being took as a trustee.

(2) That the words following the description of the donee
conferred a discretion on him limited by the charitable character
of his office; the donor had not attempted to indicate or define the
trusts on which the donee was to hold the property, and the final
words “in his diocese” were only an expression of that which
would have been implied; and that, accordingly, the gift constituted
a valid charitable trust.

In re Garrard [1907] 1 Ch. 382; 23 T.L.R. 256; *In re Flinn*
[1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541 and *In re*
Spensley’s Will Trusts [1954] Ch. 233; [1954] 1 All E.R. 178
applied.

Farley v. Westminster Bank [1939] A.C. 430; 55 T.L.R. 943;
[1939] 3 All E.R. 491 and *Dunne v. Byrne* [1912] A.C. 407; 28
T.L.R. 257 distinguished.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

By his will dated September 23, 1949, Arthur Milton Rumball,
who died on October 3, 1953, disposed of his residuary estate as
follows: “Upon trust to divide the same into two equal parts
“and to pay one of such parts to the guardians of the shrine of
“Our Lady of Walsingham at Walsingham for the purposes of
“their order and to pay the other part to the bishop for the time
“being of the diocese of the Windward Islands to be used by
“him as he thinks fit in his diocese.”

By a proviso the testator declared that the gift to the
guardians of the shrine at Walsingham was conditional upon his
having been elected a guardian at the time of his death and that
if not so elected he bequeathed to the guardians in lieu of that

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gift £100 free of duty and the whole of the residue to the "bishop for the time being of the diocese of the Windward Islands to be used by him as aforesaid."

A summons was taken out by the trustees of the will (and of a codicil dated February 14, 1953) to ascertain, inter alia, whether the gift in favour of the Bishop of the Windward Islands was apt to create a valid charitable trust.

Danckwerts J. held that the words were apt to create a valid charitable trust, and Emmiline Sarah Wilson, the seventh defendant, representing the next-of-kin of the testator, appealed.

Charles Russell Q.C. and *F. G. King* for the first five defendants, pecuniary legatees, some of whom were also interested as next-of-kin.

Nigel Warren for Mrs. Wilson, representing the next-of-kin of the testator. The ultimate gift of residue is not a valid charitable gift. It was conceded before Danckwerts J. that the bishop does not take beneficially because of the words "in his diocese." Once it is clear that a gift, described by reference to the office of the donee, is not a gift to the donee personally but that he takes it by virtue of his office, a trust appropriate to that office will be implied. Where, therefore, the donee holds an ecclesiastical or charitable office, charitable trusts will be implied unless there is a superadded direction which precludes such an implication. The cases show that where there are such superadded words a distinction must be drawn between cases where the words are general and unqualified giving the donee an absolute discretion as to the application of the gift (as in *In re Garrard*¹ and *In re Flinn*²) and those in which the added words amount in effect to a definition or an attempted definition of the objects to which the testator has directed the donee to apply the gift. In the former type of gift the apparently unqualified words cannot be construed literally, for otherwise the donee could apply the gift to his own purposes and that would conflict with the concept that he takes as a trustee. The scope of the gift is, therefore, limited by implication to purposes appropriate to the implied trust, that is, to those purposes to which the donee could properly apply the gift having regard to the nature of his office. In the second type of case, where the added words are not unqualified and general, no such dilemma arises and the words may extend the possible ambit of the purposes to which the gift could be applied beyond

¹ [1907] 1 Ch. 382; 23 T.L.R. 256.

² [1948] Ch. 241; 64 T.L.R. 203;
[1948] 1 All E.R. 541.

the scope of legal charity. If the words are not unqualified it becomes, therefore, a question of construction whether the gift is limited to charitable objects or not, and therefore whether the trusts are valid or not.

The line of authorities begins with *Thornber v. Wilson*³ and *In re Delany*,⁴ where gifts to named individuals were held not to be for their personal benefit but to be made to them as holders of offices to be applied, in the first case, for the benefit of a chapel at Kendal and, in the second, for the benefit of an association. Both gifts were held to be void.

In *In re Garrard*⁵ the gift was to the "vicar and church-wardens for the time being of Kington to be applied by them "in such manner as they shall in their sole discretion think fit." Joyce J. held that the gift was for the benefit of the parish of Kington for ecclesiastical purposes and was valid. The vicar and churchwardens did not take beneficially and the added words, he said,⁶ "merely direct that the particular mode of application "within the charitable purposes of the legacy is to be settled by "those individuals." *In re Davidson*⁷ was on the other side of the line. In that case there was a gift of residue to the Archbishop of Westminster for the time being to be distributed amongst such bodies "as he shall in his absolute discretion think "fit." The mere fact that the trustee held a religious office was not sufficient to enable the court to hold that all the purposes to which the Archbishop might in his discretion think fit to apply the gift would necessarily be charitable, and the gift was, accordingly, held to be void. Similarly, in *Dunne v. Byrne*,⁸ a gift to the Archbishop of Brisbane for purposes "most conducive to the "good of religion in this diocese" was held not to be a good charitable gift. But in *In re Bain*⁹ a gift to the vicar of St. Albans Church, Holborn, for such objects connected "with the "church as he shall think fit" was held to be a good charitable gift. *In re Bain*⁹ is not on all fours with the present case for there is a distinction between the objects of the church and those of a parish or diocese. The former is confined to the repair of the church and so forth. Russell L.J. delivered a dissenting judgment in that case and said¹⁰ that doubt had been cast on *In re Garrard*¹¹ in *In re Davidson*.¹²

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³ (1855) 3 Drew. 245; (1858) 4 Drew. 350.

⁴ [1902] 2 Ch. 642; 18 T.L.R. 741.

⁵ [1907] 1 Ch. 382.

⁶ *Ibid.* 384.

⁷ [1909] 1 Ch. 567; 24 T.L.R. 760.

⁸ [1912] A.C. 407; 28 T.L.R. 257.

⁹ [1930] 1 Ch. 224; 45 T.L.R. 617.

¹⁰ [1930] 1 Ch. 224, 236.

¹¹ [1907] 1 Ch. 382.

¹² [1909] 1 Ch. 567.

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The next case was *In re Jackson*,¹³ where the gift was to the Archbishop of Wales for the time being to be paid and applied by him in or towards the general fund belonging to the church in Wales or in his discretion in any manner as he might think best for helping to carry on the work of the church in Wales. It was held, following *Dunne v. Byrne*,¹⁴ that the alternative gift was too indefinite because it could not be said that the application by the Archbishop must be for a charitable purpose and that the whole gift was, therefore, void. In *In re Stratton*,¹⁵ decided the following year, there was a gift to the vicar of Mortlake to be applied "among such parochial institutions or purposes as he shall select." That was held not to be a good charitable gift. Nor was the gift in *In re Davies*,¹⁶ to the Archbishop of Cardiff for work connected with the Roman Catholic Church in the said archdiocese, valid.

In *In re Ashton*¹⁷ (*Farley v. Westminster Bank* in the House of Lords¹⁸) the gift was "for parish work." Those added words were said to be "enlarging words" (see *per* Lord Atkin¹⁸) which had the effect of making the gift void. *Farley v. Westminster Bank*¹⁹ is in point here for there is no reasonable distinction between a gift for use in a parish and one which is to be used in a diocese. *Farley v. Westminster Bank*¹⁹ was distinguished in *In re Simson*.²⁰ There the gift was to the vicar to be used for "his work in the parish." Romer J. held that those were narrowing and not extending words. It is submitted, however, that the reasoning in that case is not in accordance with *Farley v. Westminster Bank*.²¹ [Reference was also made to *In re Norman*,²² which followed *In re Garrard*,²³ and to *In re Eastes*,²⁴ in which *In re Bain*²⁵ was followed and *In re Davies*²⁶ distinguished.]

In the next authority, *In re Flinn*,²⁷ the gift was in these terms: "To His Eminence the Archbishop of Westminster Cathedral London for the time being I bequeath all the rest, "residue and remainder of my property of every nature and

¹³ [1930] 2 Ch. 389.¹⁴ [1912] A.C. 407.¹⁵ [1931] 1 Ch. 197; 47 T.L.R. 32.¹⁶ (1932) 49 T.L.R. 5.¹⁷ [1938] Ch. 482; 54 T.L.R. 491; [1938] 1 All E.R. 707; ([1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491).¹⁸ [1939] A.C. 430, 435.¹⁹ [1939] A.C. 430.²⁰ [1946] Ch. 299; 62 T.L.R. 498;

[1946] 2 All E.R. 220.

²¹ [1939] A.C. 430.²² [1947] Ch. 349; [1947] 1 All E.R. 400.²³ [1907] 1 Ch. 382.²⁴ [1948] Ch. 257; 64 T.L.R. 216; [1948] 1 All E.R. 536.²⁵ [1930] 1 Ch. 224.²⁶ 49 T.L.R. 5.²⁷ [1948] Ch. 241.

“kind . . . to be used by him for such purposes as he shall in his absolute discretion think fit.” In that case Jenkins J.²⁸ followed *In re Garrard*²⁹ and upheld the gift. The most recent cases are *In re Spensley's Will Trusts*³⁰ and *In re Beddy*.³¹ In the former the gift was to the National Trust on trust “for the use of the High Commissioner . . . for the time being. . . .” Should the Government of . . . Australia refuse this bequest . . . or renounce it at any future date,” the property was to be held “preferably for some purpose in connexion with Australia as the National Trust and my sister . . . if then alive may jointly decide or if . . . [the sister] be not then alive as the said National Trust may decide.” The Court of Appeal in that case reversed Vaisey J. and held that the primary gift was void for perpetuity and that the gift over failed to qualify as a valid charitable gift. They distinguished *In re Flinn*³² because the words “for some purposes in connection with Australia” showed that the testator had in mind objects by no means necessarily within the scope of the National Trust’s legitimate, and charitable, objects.

It is submitted that the present case is on all fours with *In re Beddy*,³³ a decision of Harman J., which was rightly decided and should have been followed. The gift there was “to the Roman Catholic prelate who shall be Archbishop of Westminster at the time of my death, to use for such purposes in the diocese as he may choose.” Harman J. held that the gift was bad.

The question is whether, reading the gift as a whole (and not, as in *In re Spensley's Will Trusts*,³⁴ taking the clause piecemeal and beginning with the assumption that *In re Garrard*³⁵ applies), this is a gift for diocesan purposes or uses, which on the authority of *Farley v. Westminster Bank*³⁶ may be far wider than the scope of legal charity. The superadded words in the gift to the bishop cut down what would otherwise be his absolute discretion. They are express words of limitation which exclude any implied words of limitation and distinguish this case from the *In re Garrard*³⁷ and *In re Flinn*³⁸ line of authorities.

Charles Russell Q.C. supported the above argument. The will contains words which expressly impose a limitation so that

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²⁸ [1948] Ch. 241, 251.²⁹ [1907] 1 Ch. 382.³⁰ [1954] Ch. 233; [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178.³¹ Not reported.³² [1948] Ch. 241.³³ Unreported.³⁴ [1954] Ch. 233.³⁵ [1907] 1 Ch. 382.³⁶ [1939] A.C. 430.³⁷ [1907] 1 Ch. 382.³⁸ [1948] Ch. 241.

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the bishop has not an absolute and unfettered power of disposal. There is, therefore, no need to search for and imply a limitation not in the will to avoid the dilemma referred to by Jenkins L.J. in *In re Flinn*.³⁹ The court is bound to take the actual words of the will and to give them their ordinary meaning, and it is plain that they would permit the application of the fund for non-charitable purposes.

In *In re Bain*⁴⁰ the words "connected with the church" must mean connected with the ecclesiastical edifice, and, therefore, for the repair of church within the preamble to the Statute of Elizabeth I.

The decision of Danckwerts J. is directly in conflict with *Dunne v. Byrne*.⁴¹ The words "think fit in his diocese" mean "judge most fit and proper in his diocese." There cannot be any valid distinction drawn between these words and those found in *Dunne v. Byrne*⁴¹ ("most conducive to the good of religion").

J. V. Nesbitt for the bishop. Danckwerts J. rightly decided that this was a valid charitable gift. The panoramic approach to the construction of this gift suggested by Mr. Warren is not the correct method. The words in the will should be analysed closely, as was done in *In re Flinn*,⁴² and this case will then be found to be in line with *In re Garrard*.⁴³ Russell L.J. said in *In re Bain*⁴⁴ that *In re Garrard*⁴⁵ was a doubtful decision, but it has been expressly affirmed by Jenkins J.⁴⁶; the Court of Appeal in *In re Spensley's Will Trusts*⁴⁷ assumed that it was rightly decided, and it has been followed in many cases. The present case exactly follows *In re Flinn*⁴⁸ until one comes to the words "in his diocese." These are not enlarging words; the bishop is limited to applying the gift to ecclesiastical purposes within his diocese. It is not, of course, correct to conclude that because the words qualify the discretion of the bishop they exclude the possibility of the gift being for charitable purposes. The gift is charitable; a limitation which excludes one charitable purpose does not make such a gift non-charitable. Superadded words only have that effect if, instead of limiting the gift, they extend the objects to include non-charitable purposes. In *Farley v. Westminster Bank*⁴⁹ the gift was not a gift to be used as thought fit; it was expressly for parish work, and the House of Lords said

³⁹ [1948] Ch. 241, 251.

⁴⁰ [1930] 1 Ch. 224.

⁴¹ [1912] A.C. 407.

⁴² [1948] Ch. 241.

⁴³ [1907] 1 Ch. 382.

⁴⁴ [1930] 1 Ch. 224.

⁴⁵ [1907] 1 Ch. 382.

⁴⁶ [1948] Ch. 241, 251.

⁴⁷ [1954] Ch. 233.

⁴⁸ [1948] Ch. 241.

⁴⁹ [1939] A.C. 430.

that on those words the gift might be applied to purposes which were non-charitable. The gift in the present case is not to the bishop beneficially but for ecclesiastical purposes. A gift for such purposes in a parish or diocese is valid as a charitable gift, but not if the gift is for work in the parish generally. [Reference was made to *In re MacGregor*.⁵⁰] The only purposes for which the bishop can apply this gift are the ecclesiastical purposes in his diocese. Harman J. said in *In re Beddy*⁵¹ that he was anxious to avoid making fine distinctions, but it is submitted that, in distinguishing *In re Garrard*,⁵² that is exactly what he has done, and that *In re Beddy*⁵³ was wrongly decided.

Denys Buckley supported the argument for the bishop. The test to be applied in construing this will is that stated in *In re Spensley's Will Trusts*.⁵⁴ It is necessary to see first whether the will effectively declares any purposes at all, or whether the purposes have to be implied from the character of the trustee. If the donee holds an ecclesiastical office and the gift is *virtute officii*, and it is left to him to decide the objects to which the gift shall be devoted, an intention by the testator that the gift should be devoted to ecclesiastical purposes within the character of the office of the donee will be implied. There is, however, the other type of case in which the testator has attempted to declare the trusts. If so, the question is whether, on the true construction, they are good charitable trusts or not. The question, where such a gift is made to the holder of an ecclesiastical office, is whether the trusts on which the gift is to be held are intended to be limited to the ecclesiastical purposes of the office of the donee or not. In *Dunne v. Byrne*⁵⁵ there was a clear declaration of trust but the trust was not coterminous with the archbishop's own ecclesiastical functions. The testator in that case had indicated the purposes for which he intended his money to be used, and some of the purposes indicated were held not to be charitable. *Farley v. Westminster Bank*⁵⁶ was the same type of case. But in *In re Garrard*⁵⁷ the testator did not define the purposes for which his bounty was to be applied at all. The court had to imply from the personality of the donee what the testator's intentions were. The present case is of the same type. The addition of words, such as those found here, "to be applied in "such manner as think fit" does not really add anything; the

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⁵⁰ (1932) 32 S.R.(N.S.W.) 483.⁵¹ Unreported.⁵² [1907] 1 Ch. 382.⁵³ Unreported.⁵⁴ [1954] Ch. 233, 244.⁵⁵ [1912] A.C. 407.⁵⁶ [1939] A.C. 430.⁵⁷ [1907] 1 Ch. 382.

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purpose of the gift has still to be implied from the character of the donee. The reference to the diocese has no greater force than the reference to the parish in *In re Simson*,⁵⁸ which Romer J. held had no enlarging effect.

This gift is for the ecclesiastical purpose of the donee's office "in his diocese." The donee's power of disposition only extends to his diocese. In the Australian case, *In re MacGregor*,⁵⁹ a gift for diocesan purposes was held on the construction of the particular will to be for the functions of the bishop in that diocese, but it is apparent that it would not always mean that. *In re MacGregor*⁵⁹ was decided one year after *In re Stratton*.⁶⁰ [*In re Van Wart*⁶¹ was also referred to.] It is possible to draw a relevant distinction between parochial and diocesan purposes. It is quite beyond dispute that ecclesiastical functions connected with a diocese are all charitable functions, but "parochial purposes" implies not so much ecclesiastical purposes as purposes of the community. *In re Beddy*⁶² was wrongly decided.

Warren replied.

EVERSHED M.R., having stated the facts, said: Questions of this kind are notoriously difficult and, no doubt, the distinctions illustrated by the cases appear at times very fine. Thus, a gift to the vicar and churchwardens of a particular parish "for such uses as they shall, in their sole discretion, think fit"; and a gift "to His Eminence the Archbishop of Westminster Cathedral, London, for the time being to be used by him for such purposes as he shall, in his absolute discretion, think fit" have been held to be good charitable gifts (*In re Garrard*¹ and *In re Flinn*²). But a gift to the Archbishop of Brisbane for such purposes "as the Archbishop may judge most conducive to the good of religion in this diocese" has been held by the Privy Council to be bad (*Dunne v. Byrne*³). Again, a gift to a vicar "for parish work" has been held bad by the House of Lords in *Farley v. Westminster Bank*⁴; but a gift to a vicar to be used by him as he should think fit "for his work in the parish" was held in 1946 by Romer J. to be good (*In re Simson*⁵); and in *In re*

⁵⁸ [1946] Ch. 299.

⁵⁹ 32 S.R.(N.S.W.) 483.

⁶⁰ [1931] 1 Ch. 197.

⁶¹ The Times, Feb. 17, 1911.

⁶² Unreported.

¹ [1907] 1 Ch. 382; 23 T.L.R. 256.

² [1948] Ch. 241; 64 T.L.R. 203;

[1948] 1 All E.R. 541.

³ [1912] A.C. 407; 28 T.L.R. 257.

⁴ [1939] A.C. 430; 55 T.L.R. 943;

[1939] 3 All E.R. 491.

⁵ [1946] Ch. 299; 62 T.L.R. 498;

[1946] 2 All E.R. 220.

Beddy in 1953,⁶ where the words of the gift bore a resemblance (at least) to those in the present case—for they were a gift “to the Roman Catholic prelate who shall be Archbishop of Westminster at the time of my death, to use for such purposes in the diocese as he may choose”—*Harman J.*, expressing himself as not willing to add to the fineness of the distinctions already made, held the gift to be bad.

In this notoriously difficult field some degree of fineness of distinction is, I think, inevitable. Where the question is that of the application of principles never finally stated and perhaps undefinable, which the courts have evolved from the examples given in the preamble to the Statute of Elizabeth I, to an infinite variety of forms of gift, it is inevitable that some cases will be found very near the line on one side or the other. It may, therefore, be unprofitable to lament the facts of legal experience in this class of case. Nevertheless, I think it possible to derive from an analysis of the cases the essential characteristics of those principles, so far as they are relevant, with sufficient clarity to enable the court to determine on which side of the line the present case lies; and, although I have myself been conscious of changes of view during the argument, I have in the end, and particularly after hearing the argument of *Mr. Buckley*, to whom I would like to acknowledge my indebtedness, come to the conclusion that *Danckwerts J.* was right and that the present disposition does constitute a valid charitable trust.

I begin with the language of Lord Parker in *Bowman v. Secular Society*⁷: “the circumstances of the gift or the directions given or objects expressed by the donor may be such as to impose on the donee the character of a trustee.” So, a gift to a person holding a particular office, such as that of vicar of a parish or bishop of a diocese or master of a school, may, and frequently in its context will, be held to impose on the donee the character of a trustee.

The matter was recently expressed thus by my brother Jenkins in *In re Spensley's Will Trusts*,⁸ the most recent of the reported cases: “It will be seen that inevitably those two principles must be liable to produce fine distinctions in particular cases, and it may often be hard to decide on which side of the line a given case falls. Is it a gift to a holder of an office of a charitable

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⁶ Unreported.⁸ [1954] Ch. 233, 244; [1954] 1⁷ [1917] A.C. 406, 437; 33 T.L.R. All E.R. 178.

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In the present case it was not contended otherwise than that the gift to the Bishop of the Windward Islands was intended to be a gift to him virtute officii and to impose upon him, accordingly, the character of a trustee; and, if the gift had stopped after the words "Windward Islands," so as not to include the final words in the clause, "to be used by him as he thinks fit in his diocese," the trusts would have been those exclusively appropriate to the office which he held. In this case, therefore, and in the other examples I have given, the trusts would accordingly, I apprehend, have been charitable trusts. If, therefore, in a gift of this character, there are no words added to the gift to the donee described by reference to his office, the trust would (where an intention not to make a gift to the donee for his own personal benefit is established) be implied by the law. The difficulties appear almost always to have arisen from general words which follow the gift, which may be words either of limitation or expansion.

The argument before us has been illustrated by a numerous list of reported cases, starting with *In re Garrard*¹⁰ and ending with *In re Spensley's Will Trusts*,¹¹ to both of which I have referred; and in the future the present case may well make another link in the chain. I do not propose to travel through the cases again. The examples that I have given from them sufficiently, I think, illustrate the arguments and my judgment.

The conclusion that Mr. Russell and Mr. Warren, from their analysis of the cases and their explanation of the distinctions, seek to apply to this case is as follows. Once, they say, it is seen that the circumstances or context of the gift are such as to impose the character of a trustee upon the donee and that the trusts on which the donee holds are exclusively those properly belonging to or relating to his office, then it must follow that, if the words which follow the gift are general and unqualified—

⁹ [1948] Ch. 241.

¹¹ [1954] Ch. 233.

¹⁰ [1907] 1 Ch. 382.

“for such purposes as he shall in his absolute discretion think “fit,” and the like—the trusts must still be limited to the scope of the office held; for otherwise the gift would inevitably become repugnant in itself. The general words, that is, cannot be construed literally, because they would (if so construed) allow beneficial enjoyment by the donee, which, *ex concessis*, is already negatived; and the only other possible way to construe the words is to limit their significance by reference to the office of the donee. On the other hand (they say), when the words following the gift are not general and wholly unqualified, the antinomy, or, as they express it, the dilemma, is no longer presented. The presence of the limitation or qualification of itself negatives the unlimited discretion which would create the conflict with the donee’s character as a trustee. It becomes, then, necessary to see, in such a case as the present, whether the words following the gift, not being entirely general, are, upon ordinary principles of construction, such as to comprehend non-charitable as well as charitable objects.

The argument has great force and cogency and, if it is correct, it is obviously fatal to the validity in the present case of the gift in favour of the Bishop of the Windward Islands: for clearly the uses to which the bishop might, as a trustee, seek to apply the fund within the confines of his diocese would not be all charitable purposes. But on the whole, as I have already indicated, I prefer the explanation put forward by Mr. Nesbitt and Mr. Buckley. According to their argument, the true analysis of the cases is to this effect. The question is, upon the construction of the language used, whether the words following the gift are intended merely to indicate that, within the scope of the trusts properly appropriate to the nature of the office by which the donee is described, the discretion is entirely the donee’s; or whether, by the added words, the donor is himself intending to state, or at least to indicate, the trusts upon which the donee is to hold the property. If the latter is the true interpretation, then the further question of construction arises whether the trusts so indicated or stated comprehend non-charitable objects. But where the words following the gift to the donee are absolutely general, the first is the right inference to be drawn: that is, that the words are intended merely to indicate that, within the scope of the trusts already implicit in the gift, the discretion is the donee’s; for otherwise the added words would permit the beneficial enjoyment by the donee of the fund disposed of.

The two arguments do not widely diverge but the difference

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between them, as will be seen, is vital in certain characteristics, and sufficient, in my judgment, to determine the present case. For, according to Mr. Nesbitt and Mr. Buckley, in cases like *Farley v. Westminster Bank*¹² and *Dunne v. Byrne*,¹³ the language, from the point of view of validity as a charity, was such that the testator had not been content to leave the trusts to those implicit in the office of the donee, but had himself indicated the scope of the trusts—although he did so in the broadest possible sense and in such a way that within the general bounds of those trusts the discretion should be that of the donee.

For my part, I think this argument is the sounder. I come to that conclusion for two reasons. In the first place, I think that the argument more truly accords with the principle of the decision in *Farley's* case,¹⁴ which was, as I have already mentioned, a case decided by the House of Lords. In Mr. Russell's and Mr. Warren's formulation, a qualification inserted in, or an addition made to, the words which follow the gift itself would (*prima facie* at least) be fatal, though, on the face of those words, they amounted to no more than a limitation. Such, indeed, is the present case, where the words of qualification added to the more general formula are "in his diocese," and are, therefore, as a matter of construction, merely effective to limit the operation of the trusts to the diocese as distinct from the whole of the world.

It seems, therefore, that the rule as worked out by Mr. Russell and Mr. Warren would be an automatic rule of thumb, so that any qualification of any kind would always be fatal to the validity of a gift of this kind as a charitable discretion. On the other hand, upon the view submitted by Mr. Nesbitt and Mr. Buckley, the real vice of any qualification or particularization, when added to the general formula, is that, on its true construction, it operates not as a limitation, but as an extension or expansion of what otherwise would be the scope of the trusts.

If *Farley v. Westminster Bank*¹⁵ is taken as an example, the words which were there added by way of what I have called qualification were "for parish work." In this court, to take the language of Farwell J.,¹⁶ those words "parish work" were construed as meaning "that which is sometimes compendiously 'called 'good works' in the particular parish; that is to say, 'the various activities which the vicar and churchwardens

¹² [1939] A.C. 430.

¹³ [1912] A.C. 407.

¹⁴ [1939] A.C. 430.

¹⁵ *Ibid.*

¹⁶ Sub nom. *In re Ashton* [1938] Ch. 482, 503; 54 T.L.R. 491; [1938] 1 All E.R. 707.

“promote and carry on in the parish for the good of the parishioners not only for their religious good but for their good generally, some of which, although benevolent, are not charitable in the strict sense of the word.” In the House of Lords the matter was thus expressed by Lord Russell of Killowen, where, after stating the argument that the words “for parish work” were limited to the work which the vicar and churchwardens were strictly appointed to perform (namely, the religious purposes of the parish), he said¹⁷: “For myself, I am unable to put so narrow a construction upon the words . . . In my opinion, upon the true construction of this will, the words in brackets mean that the gift is not a gift for ecclesiastical or religious purposes in the strict sense, but is a gift for the assistance and furtherance of those various activities connected with the parish church which are to be found, I believe, in every parish, but which, unfortunately for the donees here, include many objects which are not in any way charitable in the legal sense of that word.”

By making that addition of “for parish work,” therefore, the testator was indicating that the trusts upon which the vicar and churchwardens should hold the fund were those expressed by Farwell J. and Lord Russell, and the vice of them was, as I have said, that they had enlarged what would otherwise have been implicit from the nature of the office of the donee, so as to comprehend non-charitable as well as charitable purposes. Lord Atkin stated that conclusion quite plainly¹⁸: “I am entirely unable to accept that construction”; that is, the construction put forward by the respondents. “I think the words are quite plainly enlarging words. They are words of definition, it is quite true, but I think they were used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied.”

There is, however, a further, and second, reason which seems to me also to support the view of Mr. Nesbitt and Mr. Buckley. If Mr. Russell and Mr. Warren are right, the result would appear to me, as I have already indicated, to be to bring into existence what I have ventured to call a rule of thumb method of determining this class of case; and prima facie I am disposed to reject, in a matter which in the end rests upon the construction of particular documents, anything in the nature of a rule of thumb method, and more particularly when its application would appear

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¹⁷ [1939] A.C. 430, 437.

¹⁸ Ibid. 435.

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to offend against the plain logic and common sense of the matter. That such would be the effect of the rule I attempted to illustrate during the course of the argument by an example given, which as Mr. Russell pointed out was not, as I presented it, appropriate, but which, as amended, is, I think, appropriate and illustrates the point I am seeking to make. I take the language in *In re Flinn*,¹⁹ which was held to be a good gift, namely, to "the Archbishop of Westminster . . . to be used by him for such purposes as he shall in his absolute discretion think fit." Let it then be supposed that there were added to those words "other than for the repair of the cathedral." The words I have added are not such as to imply that the earlier general formula included personal enjoyment by the archbishop or included purposes which were not charitable. The effect, on the face of the words, is merely to limit the general purposes to which the archbishop, in the exercise of his official calling, could apply the fund, and to limit them by the exclusion of one purpose only, namely, the repair of the cathedral. Yet, as I follow the argument of Mr. Russell and Mr. Warren, the addition of those words "other than for the repair of the cathedral" would render the gift inevitably and automatically invalid. It seems to me, on the other hand, that if the test of Mr. Buckley and Mr. Nesbitt's analysis is applied, the effect is that which it appears to be—namely, to exclude one, and one only, of the trusts implicit in the office of the archbishop, but not so as to substitute for those trusts some new and different trusts which the testator himself lays down or defines.

I must not be taken to be saying that the analysis which has been put before us is necessarily applicable in every case of this broad kind when the charitable or non-charitable character of a gift has to be determined. As I said a moment ago, all these questions in the end turn upon the construction and effect of the particular words used. But in the class of case in what I may call the *In re Garrard*²⁰ to *In re Spensley's Will Trusts*²¹ category I think that the analysis points the way to the correct conclusion.

In the course of the argument we were referred to a New South Wales case of *In re MacGregor*,²² where the essential words were "for diocesan purposes generally"; and Long Innes J. there held that that was a valid charitable gift. I do not, for my part, think that it much assists us in the present case, because

¹⁹ [1948] Ch. 241.

²⁰ [1907] 1 Ch. 382.

²¹ [1954] Ch. 233.

²² (1932) 32 S.R.(N.S.W.) 483.

the phrase "for diocesan purposes" was held by the judge, upon the evidence before him, to mean exclusively ecclesiastical purposes. What seemed from the report more striking was the reference in the argument before the judge in Sydney to a case which had been decided by Parker J. in 1911, *In re Van Wart*.²³ The official number of that case is 1910 V. 823. According to the reference, it appeared that Parker J. had required, in making his order, an undertaking on the part of the then cardinal archbishop that the property would, in his hands, be used by him "for diocesan purposes"; and it seemed that, if that were so, at any rate Parker J. also thought that "diocesan purposes" as such were exclusively ecclesiastical and, therefore, charitable.

In the circumstances, I thought it proper to send for the order from the Public Records Office, and, in case this matter should come again before the courts, it may be useful if I state what in fact was the order, as it appears from the record. After a statement of the evidence which had been read, the order proceeded: "And the defendants, the Most Reverend Francis Bourne, "Roman Catholic Archbishop of Westminster, and the Very "Reverend Patrick Cooney, the Provincial of the Order of the "Friars Minor of St. Francis, by their counsel stating that they "respectively intend and hereby undertake to apply the gifts "or bequests of the third parts of the said testatrix's residuary "estate bequeathed to each of them respectively by the said will "for the purposes therein expressed, and the defendant His "Majesty's Attorney-General by his counsel expressing himself "satisfied with the said undertakings, this court doth declare "that upon the true construction of the said will the plaintiffs "ought to pay one-third part of the residuary estate of the said "testatrix to each of the defendants the Most Reverend Francis "Bourne and the Very Reverend Patrick Cooney on their sole "receipts and that the gift of the remaining one-third part of "the said residuary estate which became operative by virtue of "the said codicil is given to the defendants the Most Reverend "Francis Bourne and the Very Reverend Patrick Cooney in equal "shares for their own respective use and benefit free from any "trust and doth direct the same to be paid to them accordingly."

It will be seen, therefore, that, on the face of the order, it

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²³ The Times, Feb. 17, 1911. The words used were "in trust . . . for "the Archbishop of Westminster for "the time being absolutely, and I "desire that he will employ . . . a

"half . . . of such bequest for the "completion of the cathedral . . . and "the remainder in any way he likes "for other parochial purposes of his "diocese of Westminster."

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looks as though the view taken by Parker J. was that there was, as far as the relevant shares of residue were concerned, no effective trust at all; but that the bishop and his co-defendant in fact undertook to apply the funds according to the trusts or purposes declared by the testator and that that undertaking satisfied the Attorney-General. The order went accordingly. The case quite obviously does not, therefore, give any assistance in the present case, save to the extremely limited extent that, if the purposes expressed by the will were described, or to the extent to which they were described, as "diocesan purposes" it might lend some slight support to the view that diocesan purposes were exclusively ecclesiastical; but beyond that, I think the case carries us no further.

My last word shall be about *In re Beddy*,²⁴ the case before Harman J., to which I earlier alluded. Having regard to the view which I reach in the present case, the question may be asked whether I am also of opinion that Harman J.'s decision ought not to be supported. In my view, it is unnecessary to express any conclusion upon that matter. The words are, I think, materially different. In this case the words are "to be used by him as he shall think fit in his diocese": in *In re Beddy*²⁴ the words were "to use for such purposes in the diocese as he may choose." These matters always being questions of construction, it might, I say no more, well be that the correct answer to *In re Beddy*²⁴ was that the words "for such purposes in the diocese as he may choose" are substantially the same as, or at any rate not materially different from, the words in *Dunne v. Byrne*,²⁵ namely, for such purposes as the archbishop "shall judge most conducive to the good of religion in the diocese." If that is so, then, although the distinction is no doubt a fine one, it would follow that *In re Beddy*²⁶ was rightly decided, and that the decision of Danckwerts J. in the present case to the contrary effect involves no inconsistency with Harman J.'s decision.

However that may be, for the reasons which I have stated, I have come, on the whole, to the same conclusion as that reached by Danckwerts J., and I think, therefore, that this part of the appeal should be dismissed.

JENKINS L.J. The question we now have to decide is whether, as Danckwerts J. has held, the gift of residue to "the bishop for the time being of the diocese of the Windward Islands to be

²⁴ Unreported.

²⁶ Unreported.

²⁵ [1912] A.C. 407.

“used by him as he thinks fit in his diocese” is a valid charitable gift.

It is not, and could not well be, disputed that the gift is to the person for the time being holding the office of bishop of the diocese named *virtute officii*, and not a gift beneficially to the individual happening to hold that office at the date of the testator's death.

Accordingly, it is not open to doubt that the bishop for the time being takes as a trustee and that, if the gift had been to the bishop for the time being of the diocese named *simpliciter*, without the addition of the words “to be used by him as he thinks fit in his diocese,” it would have operated as a gift to the bishop for the time being on a charitable trust for ecclesiastical purposes. See, for instance, *Thorner v. Wilson*²⁷ and *In re Delany*.²⁸

It follows that the gift in question is a valid charitable gift unless the addition of the words “to be used by him as he thinks fit in his diocese” has the effect of converting what would otherwise be a valid charitable trust into a trust capable of including objects which are not charitable and, therefore, void for uncertainty.

Cases concerning gifts of this type have been only too often before the courts. The authorities were discussed in some detail in *In re Flinn*,²⁹ and their effect has been recently summarized by this court in *In re Spensley's Will Trusts*.³⁰ I, therefore, find it unnecessary to go into them all again. I think the principles to be applied are sufficiently stated in the following passages from my own judgment in *In re Spensley's Will Trusts*.³¹

I said³²: “Vaisey J. founded himself on the principle “deducible from the cases summarized and followed in *In re Flinn*.³³ I find it unnecessary to review those authorities at length, because Mr. Warren, in the course of his argument “on behalf of residue, stated the principle deducible from them “in terms which, if I may say so, appear to me to be wholly “adequate, and from which Mr. Buckley, for the Attorney-General, did not dissent. The principle deducible from those “authorities was thus stated by Mr. Warren: ‘Where there is “‘a gift to a person who holds an office the duties of which are “‘in their nature wholly charitable and the gift is made to him

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²⁷ (1855) 3 Drew. 245; (1858) 4 Drew. 350.

²⁸ [1902] 2 Ch. 642; 18 T.L.R. 741.

²⁹ [1948] Ch. 241.

³⁰ [1954] Ch. 233.

³¹ *Ibid.*

³² *Ibid.* 243.

³³ [1948] Ch. 241.

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“ ‘in his official name and by virtue of his office, then, if the
“ ‘purposes are not expressed in the gift itself, the gift is assumed
“ ‘to be for the charitable purposes inherent in the office.’

“ On the other hand, it is necessary also to bear in mind the
“ principle stated in such cases as *Dunne v. Byrne*³⁴ and *In re*
“ *Davidson*.³⁵ The principle deducible from those cases is of
“ this nature—to contrast it with the principle deducible from
“ *In re Flinn*³⁶ and the cases there followed it can appropriately
“ be introduced with a ‘but’—‘but where the purposes of a gift
“ ‘are plainly expressed in terms not confining them to purposes
“ ‘which are in the legal sense charitable, they cannot be confined
“ ‘to charitable purposes merely by reference to the character
“ ‘of the trustee. . . .’ It will be seen that inevitably those
“ two principles must be liable to produce fine distinctions in
“ particular cases, and it may often be hard to decide on which
“ side of the line a given case falls. Is it a gift to a holder of an
“ office of a charitable character *virtute officii*, with merely super-
“ added words conferring wide powers of disposition? If so, on
“ the principle followed in *In re Flinn*,³⁶ the gift will *prima facie*
“ be charitable by virtue of the charitable character of the office.
“ On the other hand, is it a gift to a trustee bearing a charitable
“ character or holding a charitable office upon trusts which
“ according to their terms are not, or are not exclusively or
“ necessarily, of a charitable nature? If so, then the scope of
“ the trust is not to be limited by reference to the character of
“ the trustee.”

The question in the present case, therefore, is whether the words “to be used by him as he thinks fit in his diocese” are merely superadded words conferring wide powers of disposition, or are words imposing trusts which according to their terms are not, or are not exclusively or necessarily, of a charitable nature. In other words, has the testator here left the purposes of the gift to be implied from the charitable character of the bishop’s office, and merely added a provision to the effect that the bishop is to have full discretion in the application of the fund for those purposes, or has he defined the trusts on which the property is to be held in terms capable of including objects which are not charitable?

In my judgment, it is reasonably plain that this question should be answered in the former sense. The testator has not defined the trusts on which the fund is to be held. He has

³⁴ [1912] A.C. 407.³⁶ [1948] Ch. 241.³⁵ [1909] 1 Ch. 567; 24 T.L.R. 760.

merely given the bishop for the time being an absolute discretion as to its application by the words "to be used as he thinks fit" and limited that discretion to the use of the fund in the area under the bishop's ecclesiastical charge by the final words "in his diocese."

Were it not for those final words, the gift in the present case would not be distinguishable in any material respect from the gift upheld in *In re Garrard*,³⁷ and would even more closely resemble the gift upheld in *In re Flinn*,³⁸ which was in these terms: "To His Eminence the Archbishop of Westminster Cathedral London for the time being I bequeath all the rest, residue and remainder of my property of every nature and kind . . . to be used by him for such purposes as he shall in his absolute discretion think fit."

We were not invited, even if it were open to us to do so, to hold that *In re Garrard*³⁹ and *In re Flinn*⁴⁰ were wrongly decided. The burden of the argument for the next-of-kin was to the effect that the presence here of the words "in his diocese" sufficed to distinguish this case from those, and to bring it within the principle of *Dunne v. Byrne*.⁴¹ So to hold would, to my mind, be carrying refinement of distinction too far. In *In re Garrard*⁴² the gift was to the vicar and churchwardens for the time being of a specified parish "to be applied by them in such manner as they shall in their sole discretion think fit," and Joyce J., after observing that a legacy to the vicar and churchwardens for the time being of a parish, without more, is a gift or charitable legacy to them for ecclesiastical purpose in the parish, went on to say⁴³ that to his mind, "The words 'to be applied by them in such manner as they shall in their sole discretion think fit,' " merely directed that the particular mode of application within the charitable purposes of the legacy was to be settled by those individuals.

If the charitable purposes to be implied from a gift to the vicar and churchwardens for the time being of a parish, without more, are ecclesiastical purposes in the parish, and the words "to be applied by them in such manner as they shall in their sole discretion think fit" merely indicate that those individuals are to settle the particular mode of application within the charitable purposes of the legacy (that is to say, "ecclesiastical

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³⁷ [1907] 1 Ch. 382.³⁸ [1948] Ch. 241.³⁹ [1907] 1 Ch. 382.⁴⁰ [1948] Ch. 241.⁴¹ [1912] A.C. 407.⁴² [1907] 1 Ch. 382.⁴³ *Ibid.* 384.

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“purposes in the parish”), I fail to see how the express addition of the words “in the parish” (which, if not expressed, would have been implied from a gift to the vicar and churchwardens for the time being simpliciter) could reasonably be held to alter the result.

So in this case a gift to the bishop for the time being of the diocese of the Windward Islands, without more, would have been a charitable legacy to him for ecclesiastical purposes in his diocese. The words “to be used by him as he thinks fit” merely direct that he is to settle the particular mode of application within the charitable purposes of the legacy (that is to say, ecclesiastical purposes in his diocese); and the addition of the words “in his “diocese” is no more than an expression of that which, if not expressed, would have been implied.

Accordingly, I regard this case as indistinguishable from *In re Garrard*⁴⁴ and *In re Flinn*.⁴⁵ It follows that, in my opinion, *In re Beddy*,⁴⁶ where a gift “to the Roman Catholic prelate who “shall be Archbishop of Westminster at the time of my death “to use for such purposes in the diocese as he may choose” was held to be distinguishable from *In re Flinn*⁴⁷ and void for uncertainty on the principle of *Dunne v. Byrne*⁴⁸ and *In re Davidson*,⁴⁹ cannot be supported so far as it is to be regarded as turning merely on the presence of the words “in the diocese.” I express myself in that way because I prefer to reserve my opinion on the question whether the form of words used in *In re Beddy*,⁵⁰ taken as a whole, may not provide a valid ground for distinguishing it from the present case.

For these reasons I agree that Danckwerts J. came to a right conclusion on this question, and, accordingly, that the appeal fails and should be dismissed.

PARKER L.J. I agree with both judgments, and there is nothing which I desire to add.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.; Bridges, Sawtell & Co.; Edwin Coe & Calder Woods for Urry, Woods & Pethick, Ventnor, Isle of Wight; Nicholl, Manisty & Co.; Treasury Solicitor.*

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⁴⁴ [1907] 1 Ch. 382.

⁴⁵ [1948] Ch. 241.

⁴⁶ Unreported.

⁴⁷ [1948] Ch. 241.

⁴⁸ [1912] A.C. 407.

⁴⁹ [1909] 1 Ch. 567.

⁵⁰ Unreported.

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[1954 S. 1190.]

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Trust and Trustee—Variation of trusts—Jurisdiction of Chancery Division—Trust for sale of land—Settlement of income of trust fund consisting of real property held on trust for sale—Settlor's power to appoint settled share by will or codicil—Transaction proposed between beneficiaries to enable settlor to obtain capital—Applicability of section 64 of Settled Land Act, 1925, to trustees for sale—Whether transaction which court could sanction—Statutory jurisdiction—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 28 (1)—Settled Land Act, 1925 (15 & 16 Geo. 5, c. 18), s. 64.

Settled Land—Tenant for life—Powers.

A settlor settled real property in 1923 on trust for sale, giving herself a protected life interest in the trust fund and a general power of appointment exercisable by will or codicil only; there were further trusts to take effect in default of appointment. In 1955 the settlor wished to increase her capital and, as she was advised that this could not be done under the terms of the settlement, she took out a summons asking that the trustees might, having regard to the statutory jurisdiction, be authorized and directed to transfer part of the capital (whether land or proceeds of sale of land) to her, and that certain persons interested should be compensated:—

Held (1), that the power under the authority of the court conferred on trustees by section 64 of the Settled Land Act, 1925, was one of the powers conferred on trustees for sale by virtue of section 28 (1) of the Law of Property Act, 1925; (2) that the proposal was a "transaction" within subsection (2) of section 64 of the Settled Land Act, 1925, so that the court had power to confer on the trustees authority to carry out the proposals; (3) that, as the proposals appeared to be for the benefit of the persons interested under the settlement, the transaction would be authorized accordingly.

In re Wellsted's Will Trusts [1949] Ch. 296; [1949] 1 All E.R. 577 and *In re Downshire Settled Estates* [1953] Ch. 218; [1953] 1 All E.R. 103 applied.

Chapman v. Chapman [1954] A.C. 429; [1954] 1 All E.R. 798 distinguished.

ADJOURNED SUMMONS.

By a settlement dated October 15, 1923, and made between Alice Maud Mary Simmons, as settlor, of the one part, and the Public Trustee and John Theodore Goddard (thereinafter called "the trustees"), of the other part, relating to the interest in certain real and personal property to which the settlor was entitled in equity, the settlor conveyed to the trustees her interest in the real property to hold the same (subject as therein mentioned)

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unto and to the use of the trustees "according to the nature of
"the said premises respectively upon the trusts and subject to
"the powers and provisions hereinafter declared and contained
"concerning the same." The settlor also assigned her interest
in the personal property to the trustees "upon the trusts and
"subject to the powers and provisions hereinafter declared and
"contained concerning the same."

The settlement contained a trust for sale, with power to
postpone, and provided that the trustees should stand possessed
of the "shares, moneys and investments settled by these presents
"(hereinafter together referred to as 'the trust fund') "on the
trusts therein mentioned.

By clause 6 (5) of the settlement it was provided: "In case
"the trusts hereinbefore declared concerning the share of the
"settlor in the trust fund shall fail then subject to the trusts
"powers and provisions herein declared and contained and to the
"powers by law vested in the trustees concerning the said share
"and to any and every exercise of the said respective powers
"the trustees shall hold the said share and the income thereof
"in trust for such person or persons for such proportions and in
"such manner in all respects as the settlor shall by will or
"codicil appoint . . ."

The effect of the provisions of the settlement was that the
settlor had a protected life interest in the trust fund and a
general power of appointment exercisable by will or codicil only;
there were further trusts to take effect in default of appointment.

In 1955 the settlor, being 63 years of age and still unmarried,
and wishing to increase her capital, took out a summons for
the following relief—namely, that the defendants, the present
trustees, might be authorized and directed under the general
jurisdiction of the court or, alternatively, empowered under the
combined effect of section 28 of the Law of Property Act, 1925,
and section 64 of the Settled Land Act, 1925,¹ to give effect
with or without modification to a transaction, as to which it

¹ Law of Property Act, 1925, s. 28:
"(1) Trustees for sale shall, in rela-
"tion to land or to manorial inci-
"dents and to the proceeds of sale,
"have all the powers of a tenant
"for life and the trustees of a settle-
"ment under the Settled Land Act,
"1925. . . ."

Settled Land Act, 1925, s. 64,
as amended: "(1) Any transaction

"affecting or concerning the settled
"land, or any part thereof, or any
"other land (not being a transac-
"tion otherwise authorized by this
"Act, or by the settlement) which
"in the opinion of the court would
"be for the benefit of the settled
"land, or any part thereof, or the
"persons interested under the settle-
"ment, may, under an order of the

was originally intended that the details should be discussed in chambers.

The preliminary question of jurisdiction was disposed of in open court and, in the course of her affidavit in support of the summons, the settlor stated as follows: "Owing to the increased cost of living, I desire to increase the amount of my free capital, but I have been advised that, as the general power of appointment conferred on me by the settlement is exercisable by will or codicil, I am unable to dispose of any capital of the trust fund during my lifetime. I have approached the defendants, who have, subject to the approval of this Honourable Court, agreed that the proposed transaction . . . should be effected."

The proposed transaction was that the trust property (so far as it consisted of land or the proceeds of sale of land) should be divided, the settlor taking the capital of one part for her own benefit, while the residue remained settled. Compensation was given to the persons interested in default of appointment, who included the persons capable of benefiting under the protective trusts (other than a possible future husband of the settlor, for whom a provision for compensation was also included), by extinguishing her power of appointment as to a portion of her property remaining in settlement.

There were no infant defendants but there was a possibility of unborn or unascertained persons being affected.

Raymond Jennings Q.C. and *T. L. Dewhurst* for the plaintiff settlor. The question is whether section 64 of the Settled Land Act, 1925, applies to land held on trust for sale; and the question also arises whether the proposals in this application fall within the provisions of section 64. It is clear, having regard to *In re Wellsted's Will Trusts*,² that section 28 of the Law of Property

"court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.

"(2) In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money, and any compromise or

"other dealing, or arrangement . . ."

Settled Land and Trustee Acts (Court's General Powers) Act, 1943, s. 2: "In subsection (2) of section 64 of the Settled Land Act, 1925, the words 'except as hereinafter mentioned,' and the words 'but does not include an application of capital money in payment for any improvement not authorized by this Act or by the settlement', are hereby repealed."

² [1949] Ch. 296; [1949] 1 All E.R. 577.

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Act, 1925, confers on the trustees all the powers of a tenant for life: the point was fully considered in the judgment of the Master of the Rolls. Section 64 of the Settled Land Act, 1925, is framed as a power to be exercised by the tenant for life under an order of the court: cf. also sections 46 and 57 (2). It is accordingly a power which can be exercised by trustees for sale of land or the proceeds of sale of land, with the approval of the court, under section 28 of the Law of Property Act, 1925. The proper construction of the two statutes of 1925 is not affected by section 1 (1) of the Settled Land and Trustee Acts (Court's General Powers) Act, 1943. The proposals put forward in this application are a "transaction" within the meaning of section 64 of the Settled Land Act, 1925, and they affect or concern the land held on trust for sale and are for the benefit of the persons interested under the settlement: see *In re Downshire Settled Estates*.³ This part of the judgment in that case is not affected by *Chapman v. Chapman*.⁴

E. I. Goulding, for the trustees, supported the application.

John Willcock for other defendants interested in the trusts of the settlement.

DANCKWERTS J. This is an application by a person who is interested in the income of property under a settlement for authority to be given by the trustees to carry out certain proposals which have been made—I carefully use the word "proposals" so as not to prejudge one of the matters for consideration in this case.

The effect of the proposals, shortly, is that the settlor, who at present is only interested in income, will be given a sum of capital for her absolute benefit to the extent which she likes, and another person who may have an interest under the settlement will be compensated in certain ways. The settlement was dated October 15, 1923, and was made by the applicant, Miss Alice Maud Mary Simmons, and by it she settled certain land, or shares in land, to which she was entitled in reversion and in respect of which in the end she became entitled to all the shares, and also certain investments. So that there was in one settlement, it may be said, both a settlement of land and a settlement of personalty.

This present application is not concerned primarily with the settlement of personalty but only with the settlement of land.

³ [1953] Ch. 218, 252-254, 259;
 [1953] 1 All E.R. 103.

⁴ [1954] A.C. 429; [1954] 1 All
 E.R. 798.

The scheme of the settlement was that the property settled was divided into three shares. One share was to be Miss Simmons's share, and she took a protective life interest under the trusts of the settlement, and after her death it was to go to her children. She had power to appoint in favour of a husband, and there is a power of appointment by will or codicil. In the event of her not exercising that power, the property was to go over to the other two shares. The other two shares were settled on similar trusts for the benefit of her brothers Eric and Donald and their issue and wives. That is shortly the scheme of the settlement.

It is suggested that the proposals can be authorized by the court under section 64 of the Settled Land Act, 1925, that section being rendered applicable by the provisions of section 28 of the Law of Property Act, 1925. I should say that the form of settlement of the land is that there is a trust for sale of the land, and all the interests, therefore, under the settlement are not interests in the land itself but are interests following on that trust for sale. So that it is not a case where there is any tenant for life, or person who would have the powers of the tenant for life under the Settled Land Act, 1925, but it is a case where there is a trust for sale.

By virtue of section 28 of the Law of Property Act, 1925, the powers given under the Settled Land Act are given to trustees for sale. [His Lordship read the section and continued:] Then there are a number of things added which I do not think are material for the purposes of the present question. It is to be observed that the section says that they are to have "all the powers."

Turning to the Settled Land Act, 1925, one finds that in Part II are set out the powers of a tenant for life. The Part which begins with section 38 is so entitled. But it appears also that there are other powers of a tenant for life, from a case which I shall have to refer to in a moment (*In re Wellsted*¹), but whether that be so or not, section 64 is one of the sections which appears in Part II, and, therefore, there cannot possibly be any doubt in the case of this settlor, except the question whether a power which is not exercisable by a tenant for life without the authority of the court (which is the position of the powers conferred by section 64) is included in the matters to which section 28 of the other Act refers.

Section 64 (1) is in the following terms: [His Lordship read the subsection and continued:] By subsection (2) it is provided:

¹ [1949] Ch. 296.

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“ In this section ‘ transaction ’ includes any sale, extinguishment
 “ of manorial incidents, exchange, assurance, grant, lease,
 “ surrender, reconveyance, release, reservation, or other dis-
 “ position, and any purchase or other acquisition, and any
 “ covenant, contract, or option, and any application of capital
 “ money,” and then the words “ (except as hereinafter men-
 “ tioned) ” have been taken out by the Settled Land and Trustee
 Acts (Court’s General Powers) Act, 1943—“ and any compromise
 “ or other dealing or arrangement,” and then there are some
 words with which I need not trouble because they also have been
 removed by the Act of 1943.

The first question is whether the power under the authority
 of the court conferred by section 64 is one of the powers conferred
 on trustees for sale by virtue of section 28 (1) of the Law of
 Property Act, 1925.

As I have already remarked, that subsection confers on trustees
 for sale all the powers of a tenant for life, and when the section
 says “ all,” one would suppose that it meant what it said. If
 there were any doubt about the matter, then in *In re Wellsted*,¹
 which was concerned with the powers conferred on a tenant for
 life in another section not in Part II of the Settled Land Act,
 the matter is put beyond doubt by the decision of the Court of
 Appeal. It seems to me quite plain that this is one of the powers
 conferred by section 28 (1) of the Law of Property Act, 1925,
 because it is one of the powers conferred on a tenant for life by
 the Settled Land Act, even though it requires the authority of
 the court to render it available and so bring it into action.
 Therefore, it seems to me quite plain that a proceeding under
 section 64 is within the powers conferred on the trustees for sale
 by section 28 of the Law of Property Act, 1925.

I was referred to the Settled Land and Trustee Acts (Court’s
 General Powers) Act, 1943, which has a certain effect with regard
 to this section, but it is plain that the provisions of that Act
 are not material for the purposes of the present matter under
 consideration.

The remaining question is whether a proposal of the kind
 which I have mentioned as put forward in the present case is
 within the authority conferred on the court by section 64 of the
 Settled Land Act, 1925. For that purpose it is necessary to
 refer to the judgment of the Court of Appeal in *In re Downshire
 Settled Estates*.² It is plain from the judgment of the Court
 of Appeal, in the consideration of a transaction in some ways

¹ [1949] Ch. 296.

² [1953] Ch. 218, 252.

resembling the present (which they authorized), that the powers conferred by section 64 are wider than those conferred by section 57 of the Trustee Act, 1925, and that they may include a proposal of the present type as being a transaction within the meaning of section 64 of the Settled Land Act, 1925. Accordingly, it seems to me that this is a transaction which, in the opinion of the court, may be for the benefit of the persons interested under the settlement within the meaning of subsection (1) of section 64 and is a transaction within the terms of subsection (2) of that section.

I therefore reach the conclusion that I have power, if I think it right, to confer on the trustees for sale the authority to carry out these proposals. That seems to me to dispose of the question of jurisdiction.

The whole of the proposals seem to have been read and there is nothing very secret about them. It seems unnecessary, therefore, that they should be further dealt with in chambers, and I can say, without further discussion, that I am satisfied that they are for the benefit of the persons interested under the settlement, and I can authorize them accordingly.

Declaration accordingly.

Solicitors: *Theodore Goddard & Co.*

J. L. D.

In re ELLENBOROUGH PARK.

In re DAVIES, DECD.

CWELL v. MADDISON.

[1954 D. 1797.]

Easement—Pleasure ground—Building estate—Sale of plots—Adjacent property reserved by vendors as private pleasure ground—Grant of enjoyment to purchasers of plots—Construction—Dominant and servient tenements—"Accommodation"—Right to

In 1888 Ellenborough Park at Weston-super-Mare and the surrounding property, being freehold land then open and unbuilt-on, was sold to tenants in common who sold, for building purposes,

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the plots surrounding the park. The conveyances of the plots were in similar form granting to each purchaser "the full enjoyment... "at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground [Ellenborough Park]... but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground." Each purchaser covenanted to pay a fair proportion of the expenses of making the pleasure ground and at all times keeping it in good order and condition and well stocked with plants and shrubs. The vendors covenanted with each purchaser, his heirs, executors, administrators and assigns, at the expense of the purchaser, his heirs, executors, administrators or assigns and all others to whom the right of enjoyment of the pleasure ground might be granted to keep Ellenborough Park as an ornamental pleasure ground. The park had become vested in the plaintiffs upon the statutory trusts for sale.

Danckwerts J. held that the right to use the pleasure ground was a right known to the law and an easement, and that accordingly the purchasers of plots and their successors in title had legal and effective easements so to use Ellenborough Park:—

Held (1) that, as a matter of construction, the grant of "the full enjoyment of the pleasure ground" to purchasers of plots contemplated the use of the park as a garden, the proprietorship of which (and of the produce of which) remained vested in the original vendors and their successors and that the user and enjoyment of the purchasers and their successors in title was a common and clearly understood conception.

(2) That Ellenborough Park was the collective garden of the neighbouring houses to the use of which it had been dedicated by the original vendors, and that the right to the full enjoyment of the park did not fail to qualify as a legal easement for want of the necessary connexion between its enjoyment and the premises to which that enjoyment was expressed to belong; the right of enjoyment of the park accommodated and served the premises entitled to the right.

Observations of Willes J. in *Bailey v. Stephens* (1862) 12 C.B.N.S. 91 explained. *Hill v. Tupper* (1863) 2 H. & C. 121 distinguished.

(3) That the rights conferred over Ellenborough Park on adjoining owners was not a right of joint occupation with the freehold owners of the park and that there was nothing repugnant to a man's proprietorship or possession of a piece of land that he should decide to make it and maintain it as an ornamental garden and to grant rights to a limited number of other persons to come into it for the enjoyment of its amenities.

Copeland v. Greenhalf [1952] Ch. 488; [1952] 1 All E.R. 786; [1952] 1 All E.R. 809 considered.

(4) That a right appurtenant to houses to use a garden for normal domestic purposes was beneficial to the houses to which the right was annexed and did not fail as being a right merely of recreation and amusement.

Observations of Martin B. in *Mounsey v. Ismay* (1865) 3 H. & C. 486, 498 considered.

(5) That the right to use a private pleasure ground was an easement known to the law.

Duncan v. Louch (1845) 6 Q.B. 904 followed. Dicta of Farwell J. in *International Tea Stores Co. v. Hobbs* [1903] 2 Ch. 165, 172 and in *Attorney-General v. Antrobus* [1905] 2 Ch. 188, 193; 21 T.L.R. 471 not followed. *Keith v. Twentieth Century Club Ltd.* (1904) 73 L.J.Ch. 545; 20 T.L.R. 462 considered.

Decision of Danckwerts J. affirmed.

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ADJOURNED SUMMONS.

In 1855, Henry Davies and Joseph Whereat owned the White Cross Estate, Weston-super-Mare, including Ellenborough Park and the surrounding property, which they were developing for building purposes. The subject-matter of this case was Ellenborough Park, a piece of land open and unbuilt on. The park and the road round it, Ellenborough Crescent or Crescent Road, was a rectangular area measuring 350 yards from East to West and about 100 yards from North to South, its Western boundary facing the sea. A right was granted to the purchasers of each of the plots of land in Crescent Road, which faced the park, to use it as a pleasure ground. A similar right was granted in respect of nine or 10 other plots not actually facing on to the park but separated only from Crescent Road by houses so fronting. There were no private ways from those houses direct to the park and access had to be obtained over the ordinary roads, a distance which did not exceed 100 to 150 yards in any case.

For the purpose of the present case it was agreed to take a conveyance dated December 23, 1864, as typical of all the conveyances conferring rights over Ellenborough Park. By that conveyance Henry Davies and Joseph Whereat sold and conveyed to one John Porter a plot of land on the White Cross Estate fronting on Ellenborough Park. After giving the exact measurements of the plot the parcels continued as follows:—
 “ Together with the messuage or dwelling-house outbuildings and
 “ premises which are now in course of erection by the said John
 “ Porter on the said plot of land . . . which are intended . . . to
 “ form No. 21 of the said row called Ellenborough Crescent . . .
 “ Together with all ways paths passages easements rights and
 “ appurtenances to the said plot of land . . . belonging or apper-
 “ taining and particularly the use and enjoyment at all times
 “ hereafter in common with the other persons to whom such ease-
 “ ments may be granted of the roads called the ‘ Crescent Road ’

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“ and the ‘ Walliscote Road ’ and of all other roads ways and
“ footpaths and of all drains . . . which shall be made on the
“ said White Cross Estate . . . And also the full enjoyment . . .
“ at all times hereafter in common with the other persons to
“ whom such easements may be granted of the pleasure ground
“ set out and made in front of the said plot of land . . . in the
“ centre of the square called Ellenborough Park which said
“ pleasure ground is divided by the said Walliscote Road but
“ subject to the payment of a fair and just proportion of the
“ costs charges and expenses of keeping in good order and con-
“ dition the said pleasure ground.”

John Porter covenanted with the vendors to complete the building of the messuage on the plot conveyed and to do so in accordance with certain specifications and plans “ similar in every respect externally and in a uniform manner with the “ messuage or dwelling-house numbered 1 in the same Crescent.” The covenant in that respect condescended to considerable detail as regards materials and as regards a dwarf wall and iron palisading, and was followed by covenants against alteration of the external elevation or structure and against user for trade or commercial purposes (with certain very limited exceptions) without the consent of the vendors or their successors in title. John Porter further covenanted to pay a fair proportion of the expense of maintaining the said roads “ And also will jointly with all “ other persons to whom the right of enjoyment of the pleasure “ ground . . . may be granted pay a fair proportion of the “ expenses of making and at all times keeping in good order and “ condition and well stocked with plants and shrubs the pleasure “ ground. . . .”

Finally, each of the vendors for himself and his successors in title covenanted with the purchaser and his successor in title “ and all other persons to whom the right of enjoyment of the “ pleasure ground . . . may be granted at all times hereafter (to) “ keep as an ornamental pleasure ground the plot of ground here- “ inbefore referred to and situate in front of and partly encircled “ by the said Ellenborough Crescent,” and also that they would not at any time thereafter “ erect or permit to be erected any “ dwelling-house and other building (except any grotto bower “ summer-house flower-stand fountain music-stand or other “ ornamental erection) within or on any part of the said pleasure “ ground . . . but that the same shall at all times remain as an “ ornamental garden or pleasure ground.”

By 1879 most of the houses fronting on to the park had been sold and Ellenborough Park and the unsold portions of the White Cross Estate were then purchased by William Henry Davies, subject as to the park to the rights of all persons entitled to its use and enjoyment as a pleasure ground. William Henry Davies died in 1889, having by his will created undivided shares in his real estate. The plaintiffs were the trustees of his will, Ellenborough Park being vested in them upon the statutory trusts for sale. The administration of the park had been in the hands of the trustees for the time being of the will of William Henry Davies until 1924, when, pursuant to an agreement, its management was handed over to a committee of so-called "ratepayers," being the persons who contributed to the maintenance of the park.

From February, 1941, to May, 1946, the park was requisitioned by the War Office, which paid a compensation rental of £150 a year; and, after military occupation had ceased, the plaintiffs received £1,770 4s. 7d. on account of dilapidations. By 1954, when this summons was taken out, Ellenborough Park was the only part of William Henry Davies' estate still undistributed.

By this summons the trustees asked:—(1) whether the owners of property fronting on the park had any enforceable right to the use of the park on payment of a contribution towards the upkeep of it as a private open space; (2) whether, in the trustees' accounts in respect of the receipts and payments for the maintenance and preservation of the park, there should be credited to the sum contributed by those owners to that expense any, and if so what part, of the rent of £150 a year received from the War Office in respect of the occupation of the park by Her Majesty's Forces during the recent war to compensate for any loss by them of the amenity during that period; (3) whether in those accounts there should also be credited any, and if so what part, of the compensation received from the War Office for dilapidations during military occupation. The payments were made under the Compensation (Defence) Act, 1939.

The defendants to the summons were Mrs. Helen Maddison, who was entitled under the will of William Henry Davies to four-sevenths of the proceeds of sale of the park, and Mr. Fred Allen who, on the footing that he was the owner of one of the relevant houses, was appointed by Danckwerts J. to represent all persons claiming to have rights of user in Ellenborough Park.

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T. A. C. Burgess for the trustees.

Nigel S. S. Warren for the first defendant, Mrs. Maddison.

The owners of property fronting on the park have no enforceable right to use the park. It must be admitted that the restrictive part of the covenant is operative and binding so far as concerns the use of the park. The covenant, however, does not create an easement properly so called. Admittedly the draftsman has used the words "easements," but that does not carry the matter any further. There is a dearth of authority on the point. In some cases the law of landlord and tenant applies, but the present is a case of freehold frontagers. All that there is here is a *jus spatiandi*, a right the existence of which is not known to the law: *International Tea Stores Co. v. Hobbs*¹ and *Attorney-General v. Antrobus*,² per Sir George Farwell. In *Keith v. Twentieth Century Club Ltd.*,³ which, like the present case, was concerned with a garden, the basic problem whether a *jus spatiandi* could be an easement in English law was never in question. In Gale on Easements, 12th ed., at p. 23, after reference to *Hill v. Tupper*⁴ and *Ackroyd v. Smith*,⁵ it is stated: "These statements have generally been interpreted to mean that the list of easements is closed, but this view of the law was never universally accepted and is contrary to modern authorities."

A. F. M. Berkeley for the second defendant, Fred Allen. The dicta of Sir George Farwell are, of course, to be accepted, but they are purely dicta. There is no decision that there cannot be a *jus spatiandi* in English law. Easements under English law are not confined to any rigid groups. They grow with the law. There is no mention of these dicta of Sir George Farwell in Goddard on Easements.

In *Duncan v. Louch*⁶ a right somewhat similar to the right in the present case was relied on as a right to pass backwards and forwards over every part of the ground. That was a case of obstructing a right of way between two specified termini. In *Carpenter v. Smith*,⁷ where rights over a beach were being used, it was held that the owners of plots were entitled to use a certain area for all the ordinary purposes for which a beach at a summer colony was used: that, being a Canadian case, is not binding on the court, but it does serve to illustrate how it is open to the

¹ [1903] 2 Ch. 165, 172.

² [1905] 2 Ch. 188, 198; 21 T.L.R.

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³ (1904) 73 L.J.Ch. 545; 20 T.L.R.

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⁴ (1863) 2 H. & C. 121.

⁵ (1850) 10 C.B. 164.

⁶ (1845) 6 Q.B. 904.

⁷ [1951] 2 D.L.R. 609.

court to deal with rights which do not come within the normal categories of easement. [Reference was also made to *Keppell v. Bailey*⁸; *Dyce v. Lady James Hay*⁹; *Solomon v. Vintners' Company*¹⁰; *Mounsey v. Ismay*¹¹; *Millechamp v. Johnson*¹²; *Abbott v. Weekly*¹³; *Copeland v. Greenhalf*¹⁴; *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*¹⁵; *Wright v. Macadam*¹⁶; *Paine & Co. Ltd. v. St. Neots Gas and Coke Co.*¹⁷; *Simpson v. Godmanchester Corporation.*¹⁸]

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1955. March 17. DANCKWERTS J. read the following judgment. The subject-matter of this case is a piece of land, open and unbuilt upon, at Weston-super-Mare, in the county of Somerset, known as Ellenborough Park. It is now surrounded on three sides by roads and houses fronting on them, known as Ellenborough Park North, Ellenborough Park South and Ellenborough Crescent. The fourth side, towards the sea front, is open and not built on. The land on which Ellenborough Park and these roads and houses are now to be found was formerly part of an estate known as the White Cross Estate, and in the year 1855 the part of that estate forming Ellenborough Park and the surrounding property belonged to Henry Davies and Joseph Whereat in equal moieties. It appears that these two gentlemen sold off the plots surrounding the park for building purposes and conveyed the plots by a number of conveyances which were in substantially similar form. A conveyance of plot No. 21 in Ellenborough Crescent, dated December 23, 1864, and made between Henry Davies of the first part, Joseph Whereat of the second part, and John Porter (a builder) of the third part, has been put in evidence as an example of such conveyances. By this conveyance, in consideration of a payment of £180, Henry Davies and Joseph Whereat conveyed the plot to John Porter in fee simple together with easements (in common with other persons) over the roads and drains on the White Cross Estate, "And also the full enjoyment (except as hereinbefore appears)" —this relates to an exception of certain exclusive rights of way

⁸ (1834) 2 My. & K. 517.

¹⁵ [1915] A.C. 599.

⁹ (1852) 1 Macq. 305.

¹⁶ [1949] 2 K.B. 744; [1949] 2 All

¹⁰ (1859) 4 H. & N. 585.

E.R. 565.

¹¹ (1865) 3 H. & C. 486.

¹⁷ (1938) 55 T.L.R. 150; [1938] 4

¹² (1746) Willes 206, note (b).

All E.R. 592.

¹³ (1665) 1 Lev. 176.

¹⁸ [1896] 1 Ch. 214.

¹⁴ [1952] Ch. 488; [1952] 1 T.L.R.

786; [1952] 1 All E.R. 809.

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and private drains, it seems—" at all times hereafter in common
 " with the other persons to whom such easements may be granted
 " of the pleasure ground set out and made in front of the said
 " plot of land intended to be hereby granted in the centre of the
 " square called Ellenborough Park which said pleasure ground
 " is divided by the said Walliscote Road but subject to the pay-
 " ment of a fair and just proportion of the costs charges and
 " expenses of keeping in good order and condition the said
 " pleasure ground." John Porter entered into covenants for the
 completion by him of the dwelling-house and buildings in course
 of erection on the plot, and he also covenanted jointly with all
 other persons to whom the right of enjoyment of the pleasure
 ground thereinbefore mentioned might be granted to pay a fair
 proportion of the expenses of making and at all times keeping in
 good order and condition and well stocked with plants and shrubs
 the pleasure ground thereinbefore referred to; and each of them,
 Henry Davies and Joseph Whereat, for himself, his executors,
 administrators and assigns, covenanted with John Porter, his
 heirs, executors, administrators and assigns at the expense of
 John Porter, his heirs, executors, administrators or assigns, and
 all other persons to whom the right of enjoyment of the pleasure
 ground thereinbefore mentioned might be granted at all times
 thereafter to keep as an ornamental pleasure ground the plot of
 land thereinbefore referred to and situate in front of and partly
 encircled by the said Ellenborough Crescent; and there was a
 further covenant that Henry Davies and Joseph Whereat, their
 heirs and assigns, would not at any time thereafter erect or permit
 to be erected any dwelling-house or other building (except any
 grotto, bower, summer-house, flower-stand, fountain, music-stand
 or other ornamental erection) within or on any part of the said
 pleasure ground in the centre of the square or space called Ellen-
 borough Park, but that the same should at all times remain as
 an ornamental garden or pleasure ground.

By the year 1879 most of the plots fronting on the park had
 been sold and houses erected thereon. William Henry Davies
 purchased from the personal representatives of Henry Davies
 and Joseph Whereat (who were both then dead) Ellenborough
 Park and such other portion of the White Cross Estate as
 remained unsold, and this was conveyed to him in fee simple by
 a conveyance dated May 21, 1879, subject as to the piece of land
 forming the pleasure ground called Ellenborough Park to the
 rights still subsisting of all persons to whom the use and enjoy-
 ment of the said pleasure ground had been granted, and the

vendors constituted and appointed William Henry Davies, his heirs and assigns, to be the true and lawful attorney and attorneys of the vendors to commence, carry on and prosecute any actions or other proceedings whatsoever for compelling the observance and performance on the part of all and any such persons and every such person as were or might be liable to the observance and performance of all and any the covenants and every the covenant the benefits or benefit of which were by virtue of the conveyance assigned to or otherwise vested in William Henry Davies, his heirs and assigns, or expressed and intended so to be.

William Henry Davies died on May 11, 1880, having by his will, dated January 16, 1868, made provisions which appear to have created in the events which have since happened undivided shares in any land which he left. The plaintiffs in these proceedings are the present trustees of his will and of the statutory trusts arising by virtue of the Law of Property Act, 1925, in respect of Ellenborough Park, which is the only part of his estate which has not been distributed. The administration and management of the park appears to have been in the hands of the trustees of the will until 1924, when a committee of those persons who contributed to the maintenance of the park (called by the somewhat misleading name of "ratepayers") was formed, and since then this committee has administered the park and collected the contributions from "the ratepayers," except during a period when the park was requisitioned by the War Office, that is, from February, 1941, to May, 1946. The War Office paid a compensation rental of £150 per annum, and the trustees received, after the cessation of military occupation, a further sum of £1,770 4s. 7d. on account of dilapidations. A considerable part of this sum has been spent on rehabilitation of the park. Timber has been cut on the park in the proper course of maintenance and sold. In addition to these moneys the trustees have received sums of money as consideration for giving consent to a variation of restrictive covenants or alterations to buildings, and the trustees have paid legal and other expenses and the cost of replanting timber. In the result, a considerable balance remains in the hands of the trustees, and doubts have arisen as to the persons who can claim the benefit of the moneys and whether contributions can still be recovered from "the ratepayers" and generally as to the rights of persons in respect of the park.

The defendants are a representative of the so-called "rate-payers," and a beneficiary under the will of William Henry Davies, who is entitled to a four-sevenths share of the proceeds

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of sale of the park. It is thought that none of the original purchasers of plots fronting upon the park remains in existence. It is conceded on the part of the representative "ratepayer" that if the successors in title of the purchasers retain enforceable rights in respect of the park, they remain subject to the burden of contributing to the upkeep thereof. The legal effect of the transactions between Henry Davies and Joseph Whereat and the purchasers of plots, however, involves questions of some interest and difficulty in regard to which clear authority is singularly lacking. The intention of the parties to these transactions seems to me to be fairly plain. In return for the contributions towards the expense which they were to make, the purchasers of plots and their successors in title were to enjoy the advantages of being able to use Ellenborough Park as a pleasure ground, presumably for perambulation and other reasonable uses incident to a pleasure garden, in addition to the benefit of having an unbuilt on space in front of their houses. It seems to me that these advantages must benefit the owners of the houses in respect of their occupation of them, and must increase the value of the houses on a sale.

It is contended that the rights conferred in these respects by the conveyances are no longer operative or enforceable against the owners of the park because they do not conform to the essential qualities of an easement, and they amount to a *jus spatiandi* or right of perambulation which (it is contended) is not a right legally capable of creation or known to English law.

The essential qualities of an easement are (1) there must be a dominant and a servient tenement; (2) an easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit; (3) the dominant and servient owners must be different persons; and (4) the right claimed must be capable of forming the subject-matter of a grant: see Cheshire, *Modern Real Property*, 7th edition, pages 460-462. It was at one time thought that such cases as *Keppell v. Bailey*,¹ *Hill v. Tupper*² and *Ackroyd v. Smith*³ indicated that the class of legal easements was closed and confined to certain well-recognized types. This is now accepted, however, to be an incorrect view. Professor Cheshire, in his book, at page 462, says: "That doctrine means not that an easement of a kind never heard of before cannot be created, but that a new species of incorporeal hereditament or a new species of burden cannot be brought

¹ (1834) 2 My. & K. 517.

³ (1850) 10 C.B. 164.

² (1863) 2 H. & C. 121.

"into being and given the status and legal effect of an easement. In other words, if a right exhibits the four characteristics described above, it is an easement which will run with the dominant and against the servient tenement, even though it may be of a kind which has not figured in practice before, but if it lacks one or more of those characteristics, it may, indeed, be enforceable between the contracting parties, but it cannot, like an easement, be enforceable by or against third parties." This, indeed, is the point in the present case. The grant in fact is not a recent one, having been made as long ago as 1864, and as observed by Lord St. Leonards in *Dyce v. Lady James Hay*⁴: "... I fancy no one supposes that recreation, taking the air, and strolling, are to be regarded as any particular novelties; or that if you are tired in a meadow, and lie down to repose yourself, the refreshment thence arising can reasonably be described as an invention." If, therefore, the rights claimed in the present case are incidents of an easement, it is not because modern life has created some novel situation.

In the present case, of course, there are no uncertainties such as occur in the case of a claim by prescription or user. There is an express grant of "the full enjoyment of the pleasure ground set out and made in front of the plot of land" conveyed to the grantee. Presumably this means the right to enjoy the ground as a pleasure ground in all the ways in which a pleasure ground would normally be enjoyed, which would no doubt include the right to walk about on any parts not covered by flower beds and the like, and to sit down on appropriate parts of the ground and possibly to picnic there.

Dr. G. R. Y. Radcliffe, in his book on Real Property Law (2nd ed., 1938), after observing that "The English law of easements is very largely derived from the Roman law of servitudes, and is governed by the general consideration that it is not desirable on grounds of public policy that landowners should be able to subject their land to new and strange burdens" (p. 146), postulates as one of the qualities of an easement that "The easement must be calculated to benefit the dominant tenement as a tenement, and not merely to confer a personal advantage on the owner of it." This I find somewhat difficult to apply, for it seems to me that the benefit received from a right of way is necessarily a benefit to the owner or occupier of the tenement rather than to the tenement itself,

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⁴ (1852) 1 Macq. 305, 313.

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though a right of support might be said to benefit the tenement as such. But Dr. Radcliffe continues: "This principle is directly derived from the Roman law of servitudes and is well illustrated by the Roman jurist Paul when he says that you cannot have a servitude giving you the right to wander about and picnic in another man's land ('*ut spatiari, et ut coenare in alieno possumus, servitus imponi non potest.*' Dig.8.1.8.)." If this is true of the English law of easements, it is apt to the situation with which I have to deal, and Dr. Radcliffe is a writer deserving respect.

In Theobald, *The Law of Land* (2nd ed., 1929, at p. 263), it is stated that an easement "must be a right of utility and benefit and not one of mere recreation and amusement." Two authorities are quoted for this statement. *Solomon v. Vintners' Company*⁵ is one of them. But in this case (which concerned a right of support), at the page referred to, Pollock C.B. says⁶: "If I build a wall at the extremity of my land, and my neighbour plays rackets against it for 20 years, is it contended that he would acquire a right to have it kept up?" Whereupon Bramwell B. observed⁷: "Probably a right not to have it pulled down, if he had used it for that purpose as of right." The other case cited is *Mounsey v. Ismay*,⁸ in which there was a claim by custom for the freemen and citizens of a town on a particular day in the year to enter on a close for the purpose of holding horse races thereon, a claim (I would observe) by a fluctuating body of persons quite incompatible with an easement. Martin B. (delivering the judgment of the court) said⁹: "But, however this may be, we are of opinion that to bring the right within the term 'easement' in the second section it must be one analogous to that of a right of way which precedes it and a right of watercourse which follows it, and it must be a right of utility and benefit, and not one of mere recreation and amusement. In our opinion, therefore, the present alleged right is not within the language or meaning of the Prescription Act, and we are satisfied that it was never in the contemplation of Lord Tenterden, who framed it (*per* Lord Wensleydale, 5 M. & W. 404), to include within the Act such customary rights as entering land to enjoy rural sports, as in *Millechamp v. Johnson*,¹⁰ or to dance upon a green, as in *Abbott v. Weekly*,¹¹

⁵ (1859) 4 H. & N. 585.

⁶ *Ibid.* 593.

⁷ *Ibid.* 585, 593.

⁸ (1865) 3 H. & C. 486.

⁹ *Ibid.* 498.

¹⁰ (1746) Willes 206, note (b).

¹¹ (1665) 1 Lev. 176.

“by analogy to which we held this alleged customary right to run horse races a lawful one at common law. What we think he contemplated were incorporeal rights incident to and annexed to property for its more beneficial and profitable enjoyment, and not customs for mere pleasure.”

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In *Dyce v. Lady James Hay*¹² Robert Dyce claimed that he and the other inhabitants of Aberdeen and the public generally had used and enjoyed from time immemorial a footpath along the River Don on the defender's estate and that a strip of land between the footpath and the river had been used by the inhabitants “for the purpose of recreation and taking air and exercise by walking over and through the same, and resting thereon as they saw proper.” The decision of the House of Lords, as expressed in the sidenote, is as follows: “There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. Semble, that where a claim in the nature of a servitude or easement is incapable of judicial control and restriction, it cannot be sustained by prescription. It does not follow that rights sustainable by grant are necessarily sustainable by prescription. The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. Where new inventions come into use they may have the benefit of servitudes and easements; the law accommodating its practical operation to the varying circumstances of mankind.” Lord St. Leonards appears to have been impressed by the invasion of the enjoyment of the defender's land which might have been caused by all the inhabitants of Aberdeen exercising the rights claimed, but he seems to have thought that an express grant might have lawfully created rights of the same nature. The claim in this case, however, was plainly in the nature of a public right, and has little to do with an easement appurtenant to a dominant tenement. On the question of rights claimed by way of easement being too extensive a reduction of the rights of the owner of the alleged servient tenement, this case has been applied by Upjohn J. in *Copeland v. Greenhalf*.¹³

In *International Tea Stores Co. v. Hobbs*¹⁴ Sir George Farwell was concerned with the use by the plaintiff company's

¹² 1 Macq. 305.¹⁴ [1903] 2 Ch. 165.¹³ [1952] Ch. 488; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809.

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servants of a way across the defendant's yard with his permission while the plaintiff company were the lessees of an adjoining house belonging to the defendant. The plaintiff company purchased from the defendant the house leased to them, and Farwell J. held that a right of way passed under the general words incorporated by the Conveyancing Act, 1881. The case has very little to do with the problem now before me, but Farwell J., in dismissing an argument of Lord Coleridge K.C., said ¹⁵: "The instance suggested by Lord Coleridge in his argument illustrates my meaning: he put the case of a man living in a house at his landlord's park gate, and having leave to use and using the drive as a means of access to church or town, and to use and using the gardens and park for his enjoyment, and asked, Would such a man on buying the house with the rights given by section 6 of the Conveyancing Act acquire a right of way over the drive, and a right to use the gardens and park? My answer is 'Yes' to the first, and 'No' to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere *jus spatii*, is not so known."

Again, in *Attorney-General v. Antrobus*,¹⁶ Farwell J. used similar language. This was the case in which a public right of resort was claimed over the defendant's land to Stonehenge. It was held that the public could not by user acquire a right to visit a public monument or other object of interest on private property. Farwell J. said ¹⁷: "It is impossible for the court, under those circumstances, to make any such presumption as is suggested. The public as such cannot prescribe, nor is *jus spatii* known to our law as a possible subject-matter of grant or prescription: and for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good." Farwell J. also said ¹⁸: "Further, the tracks which lead into the circle cease there and do not cross, and the public have no *jus spatii* or *manendi* within the circle."

It is necessary now to examine some cases which are difficult to reconcile with the statements already quoted. The first of these is *Duncan v. Louch*.¹⁹ This was an action for obstruction of a right of way by the locking of a gate. The plaintiff claimed, as the owner of No. 15, Buckingham Street, Adelphi, a right of

¹⁵ [1903] 2 Ch. 165, 172.¹⁸ *Ibid.* 206.¹⁶ [1905] 2 Ch. 188; 21 T.L.R. 471.¹⁹ (1845) 6 Q.B. 904.¹⁷ [1905] 2 Ch. 188, 198.

way therefrom over a close called Terrace Walk to an erection or building called the Water Gate abutting on the River Thames and back again to his house (which he had purchased in 1836). The evidence in the case, however, disclosed a somewhat different situation. The plaintiff put in a grant dated March, 1675, containing the following words: "Together with the free liberty, "use, benefit, and privilege, for him the said Philip Doughty" (a predecessor in title of the plaintiff) "his heirs, tenants, and "assigns, with other the inhabitants of York House and grounds, "of the Tarris Walke of the Water Gate next the river of Thames, "he, they and every of them, from time to time, contributing "and paying a rateable share and proportion towards repairing "and amending the same, with others who shall have the benefit "thereof," etc. It was not shown that the plaintiff had ever been called on to contribute towards the repairs, or that any repairs had been required. In 1675, Buckingham Street was not built, and there was evidence that in the past 10 years before the action it had become a public way. The property in the Terrace Walk was, by statute, 29 Geo. 2, c. 90, vested in trustees for the purpose of raising a fund for keeping it in repair. One of the objections on behalf of the defendant was that the right proved was not a right of way, but a right to use the walk for pleasure only, and was therefore improperly stated in the declaration. Mr. Peacock, in argument, said ²⁰: "If this be a right of "way, it is a right only of using the way for the purpose of "passing from terminus to terminus, and not of walking for "pleasure between the intermediate points. But the right is in "fact one of a kind altogether different. It is like the privilege "which the builder of a square, who reserves the centre for a "garden common to all the houses, grants to the owners and "tenants of the houses of walking about the garden, on condition "of keeping it in order." Coleridge J. thereupon observed ²¹: "The allegation may be smaller than the proof. Has not the "inhabitant of the square a right to cross the square, included "in his right to walk about the square?" A little later Lord Denman C.J. remarked ²²: "The right as pleaded is unlimited, "to walk, pass and repass at his and their free will and pleasure; "there is nothing said about the particular occasions of walking: "that is an exact description of the use which parties make of "such a terrace." And Wightman J. said ²³: "Does it not "come to this, that he has a right of way over every part of the

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²⁰ 6 Q.B. 904, 910.²¹ *Ibid.*²² *Ibid.* 911.²³ *Ibid.*

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“land in question?” In the judgments, which were in favour of the plaintiff, Lord Denman C.J. said ²⁴: “I think there is no doubt in this case. Taking the right, as Mr. Peacock suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure, they paying the necessary rates for keeping it in order, I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction, and a stranger would not be permitted to say that the plaintiff’s right was only conditional”: this was a reference to the argument for the defence. that the plaintiff’s right was conditional on the plaintiff’s willingness to contribute to repairs. Patteson J. said ²⁵: “I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another?” Coleridge J. said ²⁶: “The defendants have relied on two objections. First that the plaintiff in his declaration has incorrectly described his right as a right of way, whereas, in fact, it is a larger easement. There would be a good objection on the ground of variance if the easement claimed were inconsistent with, or different from, the easement proved; but, if, as in the present case, the thing granted is only larger than the thing claimed, and is not different in kind, it is well known that the allegation may be less than the proof, if the matter alleged be included in the matter proved.” Wightman J. said ²⁷: “The right proved in evidence is a right of passage backwards and forwards over every part of the close: the right claimed is less than this, but included in it, being a right of way from one part of the close to another. That is not objectionable on the ground of variance.” This case, of course, proceeded to some extent on the niceties of pleading, but it seems clear that if the four judges comprising the court had thought that the original grant and the evidence of user had disclosed an attempt to impose on the land a right not recognized by the law as an easement, the plaintiff’s claim must have failed. Mr. Peacock’s argument appears to have raised the precise point. In fact, the court treated the grant of 1675 as creating a perfectly valid easement, though larger in its terms than the right of way claimed by the plaintiff. This case does not appear to have been mentioned to

²⁴ 6 Q.B. 904, 913.

²⁵ Ibid.

²⁶ Ibid. 914.

²⁷ Ibid.

Farwell J. in either *International Tea Stores Co. v. Hobbs*²⁸ or *Attorney-General v. Antrobus*.²⁹ In the latter of those two cases the claim concerned was not an easement but a public right of way, and the industrious Mr. W. H. Upjohn K.C., if he was aware of *Duncan v. Louch*,³⁰ may not have thought it relevant. In the other case, the reference to *jus spatiandi* by Farwell J. appears merely to have been an incidental remark by that learned judge to illustrate his meaning.

It is difficult to draw useful inferences from the position of square gardens in London and other large towns, because different conditions apply in many cases to such open spaces. It is probable that in many cases the situation depends on the terms of leases, and is regulated by the law of landlord and tenant. Or the position may be regulated by special statutes or general statutes, such as the Recreation Grounds Act, 1859, or the Town Gardens Protection Act, 1863, by which gardens in squares of fifty years' standing may be vested in the Metropolitan Board of Works (whose successors are the London County Council), or other corporate authority, or in a committee of rated inhabitants, and bye-laws may be made.

But *Keith v. Twentieth Century Club Ltd.*³¹ appears to be a case concerning ornamental gardens in London, not complicated by these statutes, or the position of leaseholders. By an indenture dated June 25, 1852, Felix Ladbroke, being owner in fee simple of certain houses known as Kensington Park Gardens and of an ornamental garden or pleasure ground lying to the north of them, and on which they abutted at the back, granted to Charles Henry Blake in fee simple a piece of ground lying to the north of the ornamental garden and including the site of certain houses (some of which were then in course of erection and others subsequently built) known as Stanley Gardens, similarly abutting upon the garden. This conveyance provided as follows: "This
"indenture further witnesseth that for the considerations afore-
"said he the said Felix Ladbroke doth hereby grant and confirm
"to the said Charles Henry Blake his heirs executors adminis-
"trators and assigns and his and their lessees and sub-lessees
"and tenants (being occupiers for the time being of the houses
"now in course of erection or at any time hereafter to be erected
"immediately contiguous and adjoining to the hereinbefore
"mentioned ornamental enclosure or pleasure ground) and for

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²⁸ [1903] 2 Ch. 165.²⁹ [1905] 2 Ch. 188.³⁰ 6 Q.B. 904.³¹ (1904) 73 L.J.Ch. 545; 20 T.L.R. 462.

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“ his and their families and friends in his and their company or
 “ without free use and rights of ingress egress and regress at all
 “ times hereafter into out of and upon the ornamental garden
 “ with all rights privileges advantages and appurtenances what-
 “ soever to the free use and right of ingress egress and regress
 “ belonging to or in any wise necessary for the full and absolute
 “ enjoyment thereof respectively he and they nevertheless con-
 “ forming to such rules and regulations as to the use of the same
 “ as shall be ordered and laid down by the said Felix Ladbroke
 “ his heirs and assigns and the committee (if any) of the resident
 “ inhabitants of the houses adjoining the said ornamental ground
 “ to whom the management and control of the said ornamental
 “ ground shall be committed for the preservation and keeping of
 “ the same and also contributing towards the expenses of main-
 “ taining and keeping up the same such annual sum not exceed-
 “ ing two guineas per house as shall be contributed by the
 “ owners or occupiers of the other houses on the south side of
 “ the said ground.” The plaintiff, who was the owner in fee
 simple and an occupier of a house in Stanley Gardens, and the
 tenants of certain other houses in Stanley Gardens and Ken-
 sington Park Gardens, complained that the defendant company,
 which had purchased four houses in Stanley Gardens, used by
 the company for the purpose of providing furnished residential
 rooms for educated women workers, were allowing the use of the
 ornamental garden by the women workers who were members of
 the club managed by the defendant company, and sought an
 injunction. A consent order was made in the action for the
 following questions to be set down as points of law, namely,
 (1) whether by virtue of the indenture of June 25, 1852, and of
 the fact that the payment of two guineas per house had been
 claimed by the committee of management of the garden against,
 and had been paid by, the company in respect of each of the
 houses held by the company for the use and enjoyment of the
 garden, the resident members of the club were entitled as of right
 during their resident membership to enter into and use the
 garden; or (2) whether the defendant company, by virtue of the
 same indenture and fact, were entitled to authorize or allow
 entry and user by resident members; and (3) whether the defen-
 dant company, by virtue as above, were entitled to authorize or
 allow non-resident members of the club to enter and use the
 garden. The freehold owner of the garden was not a party to
 the action, and it was not in the interests of the plaintiffs or the
 defendant company to contend that the deed of 1852 created no

legal rights enforceable by the existing householders in respect of the garden. But it seems to me almost certain that Buckley J. would have refused to decide the questions depending on the construction of the deed if he had thought that no valid legal rights which could be attached to the ownership of the houses were created by the deed of 1852. In fact, Buckley J. dealt with the matter, and decided that the members of the club, whether resident or not, were not "lessees" or "sub-lessees" or "tenants" or "families" or "friends" of the defendant company within the meaning of the deed, and were not entitled to the use of the garden, and that the defendant company were not entitled to authorize them to use it. The circumstances of this case obviously have strong resemblance to those of the present case.

I have been referred also to a Canadian case, *Carpenter v. Smith*.³² It appears that a number of purchasers of lots near Lake Huron in Ontario had acquired their properties from a common vendor by reference to a plan on which there was shown an adjoining strip of land, 66 feet wide, marked "Shore Reserve," and beyond this a further area about 200 feet wide, marked "Sandy Beach," and bounded by a wavy line called "Water Line." Owing to the recession of the water of the lake this area had increased to a width of 518 feet. The defendant was a purchaser of these areas from the vendor, and only one of the plaintiffs was an original grantee from the vendor. The judge held that the owners of the plots were entitled by virtue of an implied grant, that is, it appears, by virtue of the principle preventing a grantor of land from derogating from his grant, to a right to use the area between the "Shore Reserve" and the water for all purposes for which a beach was ordinarily used at a summer colony. So far as I can see, the contest in the case turned on the question whether the plaintiffs were able to make a title through an implied grant and in spite of the accretion, and it does not seem to have been considered whether the right claimed over the beach area was a right of a kind known to the law. I do not find this case, therefore, of definite assistance on the question which I am considering, though obviously rights, as wide as those at issue in the present case, were recognized as legal rights.

I was referred to *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*³³ (in which the Privy Council accepted as an easement a right to place trade goods on land),

³² [1951] 2 D.L.R. 609.

³³ [1915] A.C. 599.

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and *Wright v. Macadam* ³⁴ (in which the Court of Appeal held that the use by the tenant of a top floor flat of a shed in the garden for the storage of coal was a right known to the law), but these cases do not assist me much. They are, of course, examples of the principle now accepted that "it is not the law that every " easement must be one hitherto recognized by law, such as " light, air or a watercourse ": *per* Goddard L.J. in *Paine & Co. v. St. Neots Gas and Coke Co.* ³⁵ The enjoyment of amenities which I am now considering is no modern novelty, as I have already pointed out. *Simpson v. Godmanchester Corporation* ³⁶ is nearer to the point, for in that case the rights claimed related to a grant of 1689, and upwards of 200 years' uninterrupted enjoyment. I am bound to say that if a right to open locks on the River Ouse upon the land of another is accepted by the court as a right known to the law and an easement, I find it difficult to see what are the objections to a right to use neighbouring land for the purpose of enjoying air and exercise and similar amenities. Further, it is evident that the attachment of such amenities to the ownership of a particular house may add considerably to the value and the enjoyment of the house. As regards fettering the land which is the subject of the rights, the covenants entered into by the vendors in the present case prevent them or their successors in title building upon the site of the pleasure ground, and its existence as a pleasure ground in accordance with the intentions of the grantors is patent to anyone who visits the locality. I must confess that I have a leaning towards the intentions of the parties to transactions being carried out, if this is legally possible, and a dislike of seeing them defeated by the technicalities of suggested rules of law. Unless, therefore, I am compelled by the state of the authorities, I am not anxious to deprive the owners of the plots on the former White Cross Estate of the rights which the vendors' conveyances from 1855 to 1864, or thereabouts, attempted to give them.

In my view, there are authorities binding on me which lead me to the conclusion that the right to use a pleasure ground is a right known to the law and an easement. These are *Duncan v. Louch* ³⁷ and *Keith v. Twentieth Century Club Ltd.* ³⁸ These cases could not have been decided as they were unless the right to use a pleasure ground had been accepted as a valid easement

³⁴ [1949] 2 K.B. 744; [1949] 2 All E.R. 565.

³⁵ 55 T.L.R. 150, 152; [1938] 4 All E.R. 592.

³⁶ [1896] 1 Ch. 214.

³⁷ 6 Q.B. 904.

³⁸ 73 L.J.Ch. 545.

effective against the land in question against later owners and enforceable by successors in title to the grantees of the properties to which the enjoyment of the right was attached. Neither the obiter dicta of so eminent a Chancery judge as Sir George Farwell nor the statement by the Roman jurist Paul, in my view, can compel me to come to a conclusion inconsistent with these cases.

Accordingly, the conveyances of parts of the White Cross Estate conferred on the purchasers and their successors in title legal and effective easements to use the pleasure ground known as Ellenborough Park in the manner in which it was intended by the conveyances to be used, subject to the obligation to pay a fair and just proportion of the costs, charges and expenses of keeping it in good order and condition. The first question raised by the summons must be answered in the affirmative, but, for the expression "the ratepayers" I will substitute "the property owners contributing to the maintenance of the pleasure ground."

Counsel addressed the court on the questions who were entitled to the rental compensation and how the trustees ought to apply the £1,770.

DANCKWERTS J. The point which I have to decide now as a result of the judgment I have given is not at all easy; in fact it is very difficult. The effect of the judgment which I have given is that there are on the one hand the trustees of the will of William Henry Davies, who are the owners of the site of Ellenborough Park; on the other, the persons who were entitled to easements over the land in question. Those include the successors in title of the various purchasers of the White Cross Estate, who were the owners of the adjoining houses or dominant tenements during the period between 1941 and May of 1946 when the land was in the occupation of the military authorities, and, therefore, they were deprived of any chances to enjoy their right over the land.

The payments which have been received in respect of the land by the trustees fall under three heads. There is money which they received for the sale of the timber. It is conceded that the proceeds of the sale of timber belong to the trustees, and, therefore, no question arises with regard to that. The other two classes of payments received are, a compensation rental, paid by the military authorities, of £150 per annum from 1941 to 1946. The total sum received was £839 8s. 11d. There are,

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however, it seems to me, certain payments which had to be made, for the purpose of receiving these rental payments, which ought to be deducted from the sum, amounting to £249 15s., so reducing the sum received from rental to the net sum of £589 13s. 10d. The remaining payment was a payment for dilapidations, injury and damage to the property in question. The payments must have been made under the Compensation (Defence) Act, 1939.¹ The rental compensation falls within section 2 (1). [His Lordship read the relevant parts of sub-sections (1) and (2), and continued:] It seems to me that the persons who were entitled to occupy the land during the period in question were the trustees. It is perfectly true that the owners of the dominant tenements, the houses round the land, had important rights to the land in question, but they were only incorporeal rights. Therefore those rights cannot, as it seems to me, amount to occupation of land; the position of occupiers must be that of the trustees. They keep the land, and, therefore, are *prima facie* entitled to payment of the compensation rental.

I do not think, however, that that is the end of the matter, because the fact that it is paid to the occupier does not necessarily decide, as it seems to me, the ultimate position as regards persons who were all interested in the land in question. At any rate, it appears that in relation to compensation or compulsory purchase the rights of owners of easements are recognized and such persons are entitled to compensation if their rights are taken away. I think I must assume that the position is similar for the compensation rental paid under this particular requisition. Accordingly, it would appear that of the net sum of £589 13s. 10d., which represents the compensation rental, the owners of rights of easement over the land are entitled to some portion of the sum

¹ Compensation Defence Act, 1939, s. 2 (1): "The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say,—(a) a sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation of the land, during the period for which possession of the land is retained in the exercise of emergency powers, under a lease granted immediately before the beginning of that period, whereby the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the

"repairs and insurance and the other expenses, if any, necessary to maintain the land in a state to command that rent . . ."

Subs. (2) provides that the rent . . . shall be considered as accruing due from day to day during the period for which the possession of the land is taken in the exercise of emergency powers, and be apportionable in respect of time accordingly; and shall be paid to the person who for the time being would be entitled to occupy the land but for the fact that possession thereof is retained in the exercise of such powers. . . ."

so received. It is not for me to say how much that would be; it would be a matter for assessment by an expert, such as a surveyor. It seems to me that I shall have to direct an inquiry as to the proper amount of the net sum received which is referable to the deprivation of the owners of the dominant tenements of their right to enjoy their right over the land, and also an inquiry who those persons during the period in question were and what are the respective amounts payable out of the compensation to such respective persons.

I come, then, to the remaining matter, the sum which has been paid in respect of damage to the land. It seems to me that this depends really on the construction of the terms of the deed of 1864 and the obligation. The person entitled was to "pay a fair proportion of the expenses of making and at all times keeping in good order and condition and well stocked with plants and shrubs the pleasure ground hereinbefore referred to." By implication I think the owners were in effect at all times to keep this place as an ornamental pleasure ground and were under an obligation to apply the moneys which they received for the purpose of keeping up the property as a reasonable pleasure ground. It seems to me, therefore, that it would be quite wrong for the trustees as owners of the site to apply for the purposes of the beneficiaries for whom they are trustees the moneys which have been received by them in respect of damage and which, as it seems to me, are properly applicable for the purpose of reinstating the property as a pleasure ground. Accordingly it seems to me that in that respect the obligation is for the trustees to apply the moneys which they received in that manner and that they will not be entitled to demand further contributions from the owners of the dominant tenements until the money has been exhausted in that manner.

Order accordingly.

K. R. A. H.

Mrs. H. Maddison appealed. On the appeal the question who was entitled to the compensation moneys was not argued, the parties having come to an agreement as to their application. The only question which arose for decision on the appeal was whether the present owners of the houses, which had been granted rights of user over Ellenborough Park, had legally enforceable rights. It appeared that Mr. Fred Allen was only

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the tenant of a plot and in the Court of Appeal provision was made for the freehold owner of his plot to be added as defendant.

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Geoffrey Cross Q.C. and *Nigel Warren* for the first defendant, Mrs. Maddison, the appellant. This appeal raises the general question whether the freehold owners of land can by deed confer on the owner of a dominant tenement a right in perpetuity to use a servient tenement as a pleasure ground. It is submitted that Danckwerts J. was wrong in holding that such a right can be created as a legal easement.

The conveyance of 1864 contains four provisions relevant to the present question: (1) The grant of a right to enjoy the park as a pleasure ground; (2) a covenant by the purchaser to contribute to its upkeep; (3) a covenant by the vendor to maintain the park as a pleasure ground; and (4) a covenant by the vendors not to build on the park. The original parties to the conveyance are now dead and the second and third provisions, being positive covenants, do not run against their successors in title: *Austerberry v. Corporation of Oldham*.² It is admitted that the fourth provision is enforceable as a restrictive covenant. The question is whether the first provision, conferring the right to use the park as a pleasure ground, creates a legal easement. It is not disputed that an easement may be made conditional on certain payments being made. For a legal easement to be created, it must satisfy the four requirements laid down in Dr. Cheshire's *Modern Real Property*, 7th ed., pp. 456 et seq., namely:—(1) There must be a dominant and a servient tenement; (2) an easement must accommodate the dominant tenement; (3) the owners of the dominant and servient tenements must be different persons, and (4) the right cannot amount to a legal easement unless it is capable of forming the subject-matter of a grant. It is not disputed that the first and third requirements are satisfied here. It is submitted that the second and fourth are not.

The right to use the park as a pleasure ground fails to qualify as an easement since the right is not connected with the use of the dominant tenement. A right may enhance the value of the dominant tenement though it is not connected with its use and enjoyment. Such a right cannot be made to run with the dominant tenement. For example, if the owner of a dwelling-house were given the right to enter the grounds of Hurlingham free of charge or to use a box at the Albert Hall, such a right could not be annexed to the house so as to run with it, since it

² (1885) 29 Ch.D. 750.

would not be connected with the use of the dominant tenement, although it would enhance its value. Such a right could be enjoyed independently of the dominant tenement and would not qualify as an easement. The conveyance contains no limitation on the rights of the original vendors to grant similar rights over Ellenborough Park to the owners of other houses. For there to be a good easement it must appear both what are the rights of the dominant owner and what are the rights of the servient owner. Here it does not appear what rights are left to the owners of the park.

For a legal easement to be created it must subserve the dominant tenement (*Ackroyd v. Smith*³), and be a right which would not exist apart from the dominant tenement: *Todrick v. Western National Omnibus Co. Ltd.*⁴ The right to use a seat in a church owes its validity to ecclesiastical law and is not an exception to the general rule. A right to keep a signboard on another man's land is an easement, if the signboard is related to the user of the dominant tenement; if it is not so related, the right is a licence, not an easement. [Reference was made to *Robinson v. Bailey*⁵; *Hill v. Tupper*⁶; *Bailey v. Stephens*,⁷ and *Simpson v. Mayor of Godmanchester*.⁸]

The appellant relies on the observations of Farwell J. in *International Tea Stores Co. v. Hobbs*,⁹ and in *Attorney-General v. Antrobus*,¹⁰ where he said that a right to wander over another man's land could not exist as a legal easement. These observations are correct. English law does not recognize a *jus spatiiandi*. The decision in *Keith v. Twentieth Century Club Ltd.*¹¹ does not assist. *Duncan v. Louch*¹² was before the decision in *Ackroyd v. Smith*¹³ and, so far as it was there held that a *jus spatiiandi* can exist, it was wrongly decided. [*Wimbledon and Putney Commons Conservators v. Dixon*¹⁴ was also referred to.]

Further, it appears from *Copeland v. Greenhalf*¹⁵ that it is repugnant to the conception of an easement that the rights of the owner of the dominant tenement should reduce the right of the servient owner to, in effect, no rights at all. If this is an easement, the rights of the owners of the dominant tenements

³ (1850) 10 C.B. 164.

¹⁰ [1905] 2 Ch. 188, 198.

⁴ [1934] Ch. 561.

¹¹ (1904) 73 L.J.Ch. 545; 20 T.L.R.

⁵ [1948] 2 All E.R. 791; [1948] 462.

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¹² (1845) 6 Q.B. 904.

⁶ (1863) 2 H. & C. 121.

¹³ 10 C.B. 164.

⁷ (1862) 12 C.B.N.S. 91.

¹⁴ (1875) 1 Ch.D. 362.

⁸ [1896] 1 Ch. 214; [1897] A.C.

¹⁵ [1952] Ch. 488; [1952] 1 T.L.R.

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786; [1952] 1 All E.R. 809.

⁹ [1903] 2 Ch. 165, 172.

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are so extensive as to reduce the rights of the owners of the park to a nullity. The respondent is claiming, in effect, what amounts to a joint ownership with the owners of the servient tenement. Such a right is not an easement.

[Reference was made to the preface to the first edition of Gale on Easements; Holdsworth, *A History of English Law*, Vol. III, p. 154; *Attorney-General v. Horner* (No. 2)¹⁶; The American Restatement of the Law, Vol. V, Division Servitudes, p. 2910.]

R. W. Goff Q.C. and *Maurice Berkeley* for the second defendant, Fred Allen, the respondent. It is clear that the list of legal easements is not closed: Gale on Easements, 12th ed., p. 23. It is accepted that it is not sufficient in order to establish a legal easement to show that the right claimed benefits the dominant tenement. The test is whether the right is connected with the beneficial enjoyment of the dominant tenement. The suggestion made by Willes J. in *Bailey v. Stephens*¹⁷ that it must benefit no one else is not to be found expressed in any other case. If the facts are considered in *Bailey v. Stephens*,¹⁸ *Ackroyd v. Smith*¹⁹ and *Hill v. Tupper*²⁰ the right claimed was unconnected with the dominant tenement. In the case before Willes J. the right in question could exist in gross. Some easements can exist independently of the dominant tenement: *Attorney-General v. Horner* (No. 2).²¹ [*Todrick v. Western National Omnibus Co. Ltd.*²² was also referred to.]

The right to use a box in the Albert Hall granted with a dwelling-house would be a fortuitous right unconnected with the enjoyment of the house. It is different from the right to enjoy a garden. Such a right is an amenity of a house. On the true construction of this conveyance the right to use the park is connected with the property. It appears from the structure of the conveyance that the parties intended to create legal easements over the park and not mere licences. The grantees were to have rights of property. The words used are apt to create such rights rather than merely contractual rights. The terms of the grant show that the rights granted were connected with the houses in question. The right was described in terms as an easement. The right granted is clear in conception and there is no uncertainty as to its nature. The right to enjoy a pleasure garden does not

¹⁶ [1913] 2 Ch. 140, 196; 29 T.L.R. 451.

¹⁷ 12 C.B.N.S. 91.

¹⁸ *Ibid.*

¹⁹ 10 C.B. 164.

²⁰ 2 H. & C. 121.

²¹ [1913] 2 Ch. 140.

²² [1934] Ch. 561.

entitle the owners of the dominant tenement to enjoy its produce. The right in question is not a mere right of recreation. To sit in a garden is an amenity. Recreation can have no connexion with the dominant tenement. [Theobald, *The Law of Land*, 2nd ed., p. 263; *Mounsey v. Ismay*,²³ and *Solomon v. Vintners Co.*²⁴ were referred to.]

The covenant not to build on the park and to keep it up as a garden imports a negative covenant not to use it for any other purpose. So regarded, there is nothing inconsistent with a right to use it. The owners can take the fruit of it and by its ownership they can enforce the restrictive covenants entered into by the owners of the surrounding plots. They can make a profit from the park by selling the timber and the produce of it. The rights granted to the surrounding houses do not prevent the owners from having the enjoyment of the park. The residual ownership is in them.

In the grant "full enjoyment" of the pleasure ground means the right to do anything that can reasonably be done in a garden, but it does not include a right to make a profit by, e.g., picking the flowers. The right conferred is not a *jus spatiandi*. The owners of the dominant tenement cannot walk on the flower beds. The extent of the right conferred depends on the construction of the grant. The rights granted are not inconsistent with or repugnant to the ownership of the freeholders. It would probably be contrary to public policy to covenant not to use land for any purpose whatsoever. If land is subject to a right of way it is wholly sterilized for any other purpose. A covenant to use land only for the purpose of a garden is valid.

There is a difference between rights under the Prescription Act and under a grant: *Dyce v. Lady James Hay*.²⁵ Every right which may be granted cannot necessarily be secured by prescription. In the case of an express grant the extent of the grant is a question of construction. [Reference was made to *Copeland v. Greenhalf*²⁶; Bowers, *Covenants Affecting Land*, p. 113; *Tulk v. Moxhay*²⁷; *London and South Western Railway Co. v. Gomm*²⁸; *Abbey v. Gutierrez*,²⁹ and *Knox v. Sansom*.³⁰]

The observations of Farwell J. in *International Tea Stores Co. v. Hobbs*³¹ were obiter and may have been founded on the

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²³ (1865) 3 H. & C. 486.²⁴ (1859) 4 H. & N. 585.²⁵ (1852) 1 Macq. 305.²⁶ [1952] Ch. 488.²⁷ (1848) 11 Beav. 571.²⁸ (1881) 20 Ch.D. 562.²⁹ (1911) 55 S.J. 364.³⁰ (1877) 25 W.R. 864.³¹ [1903] 2 Ch. 165, 172.

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erroneous view that the classes of easement were closed or they may have been borrowed from the Roman jurist Paulus. Under English law an easement must have certain defined characteristics. It is submitted that the grant here of rights over the park have those characteristics and a valid legal easement was created. The statement of Farwell J. in *Attorney-General v. Antrobus*³² was not a considered statement. Reliance is placed on *Keith v. Twentieth Century Club Ltd.*³³ and *Duncan v. Louch*,³⁴ which directly support the contention that this is a legal easement. [*Wimbledon and Putney Commons Conservators v. Dixon*³⁵ was also referred to.]

This is a case of an express grant which, on its true construction, shows an intention to create easements running with the land. Here there is a direct nexus between the dominant tenement and the right granted. The right to enjoy the park as a pleasure ground is an amenity enjoyed with the dominant tenement. There is no uncertainty as to the right granted nor is there any uncertainty as to the rights of the servient owner. This is the case of an express grant and the principle applied in *Dyce v. Lady James Hay*³⁶ and *Copeland v. Greenhalf*³⁷ has no application.

Geoffrey Cross Q.C. in reply. For a valid easement to be created the right granted must be connected with the enjoyment of the dominant tenement. A *jus spatiandi* is not a valid easement because it is a right of personal enjoyment not connected with the dominant tenement. It is a right to go on to another's land for pleasure. That is the basis underlying the observations of Farwell J. A right to use another's land for purposes of recreation is not a valid easement. This right is not inseparably connected with the house to which it is purported to be annexed. A right which can be granted by means of joint occupation cannot be obtained by way of easement either by way of grant or prescription. Here the respondent claims rights over the whole of Ellenborough Park. It is a claim to a joint occupation with the freeholder and such a right is not a legal easement. In *Duncan v. Louch*³⁸ the point at issue here was never argued and it is not a decision on this question.

T. A. C. Burgess for the plaintiff trustees.

Cur. adv. vult.

³² [1905] 2 Ch. 188, 198.

³³ 73 L.J.Ch. 545.

³⁴ 6 Q.B. 904.

³⁵ 1 Ch.D. 362.

³⁶ 1 Macq. 305.

³⁷ [1952] Ch. 488.

³⁸ 6 Q.B. 904.

Nov. 15. The judgment of the court was read.

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EVERSHED M.R. The substantial question raised in this appeal is whether the respondent, or those whom he has been appointed to represent, being the owners of certain houses fronting upon, or, in some few cases, adjacent to, the garden or park known as Ellenborough Park in Weston-super-Mare, have any right known to the law, and now enforceable by them against the owners of the park, to the use and enjoyment of the park to the extent and in the manner later more precisely defined. Both the premises now belonging to the respondent, or to the owners for whom he acts as champion, and also the park itself, were originally part of an estate known as the White Cross Estate. The houses in question were built and the park laid out in the middle of the last century. None of the owners of the houses is an original grantee from the proprietors of the White Cross Estate. Similarly, the present owners of the park are the successors in title of the original grantors of the premises of the house owners.

A second question is also raised in the appeal. It is, on the basis that the house owners have an enforceable right in law against the park owners, in what proportions between the house owners on the one side, and the owners of the park on the other, should certain sums of money be divided, which have been paid to the latter by the War Office, in respect of the occupation of the park under requisition by the military authorities during the war? Danckwerts J., who came to a conclusion on the main question in favour of the respondent, also made an order as to part of these compensation moneys: but, as to the rest, directed an inquiry of a somewhat complicated character, for the purpose of ascertaining how the remainder of such moneys should be divided between the owners of the park, on the one hand, and the house owners, on the other.

Although the payment of the compensation moneys was the circumstance which gave rise, in fact, to the present substantial question in the case, this court has been absolved from any determination of the question of their division: for, with a view to avoiding the considerable costs of the inquiry which has been directed, the parties before us have agreed upon a compromise of that question, which the court is prepared to approve: and the compromise also extends to the application of those moneys in the alternative event of this court arriving at a different view from that of Danckwerts J. upon the main question.

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It is the plaintiffs in the action who are the present owners of the garden or park; but they hold the property as trustees upon certain trusts under which the first defendant, Mrs. Maddison, is one of the beneficiaries. She has accordingly been the appellant in this court. The second defendant, Fred Allen, who is the respondent to this appeal, was appointed by Danckwerts J. to represent for the purposes of the proceedings "all persons claiming to have any rights of user of the . . . property known as Ellenborough Park as a private open space." In the course of the hearing before us it appeared that the respondent is in fact not the owner of any of the relevant premises, but is a tenant of one of the houses which belongs to a limited company. It was agreed by counsel before us that the limited company should be added as a defendant to the proceedings, and its name added to the brief of Mr. Goff, who appeared for the respondent, and who informed us that he had been sufficiently instructed by the company. The appeal proceeded before us accordingly on the basis that the house owner was before the court, and the order which will be drawn up must provide for the necessary amendment of the proceedings.

✓ The substantial question in the case, which we have briefly indicated, is one of considerable interest and importance. It is clear from our brief recital of the facts that, if the house owners are now entitled to an enforceable right in respect of the use and enjoyment of Ellenborough Park, that right must have the character and quality of an easement as understood by, and known to, our law. It has, therefore, been necessary for us to consider carefully the qualities and characteristics of easements, and, for such purpose, to look back into the history of that category of incorporeal rights in the development of English real property law. It may be fairly assumed that, in the case of *Duncan v. Louch*,¹ the Court of Queen's Bench in the year 1845, and particularly Lord Denman C.J., who delivered the first judgment in the court, was of opinion that such a right as the respondent claims was capable of fulfilling the qualifying conditions of an easement. And Buckley J., in the case in 1904 of *Keith v. Twentieth Century Club Ltd.*,² answered certain questions which Byrne J. had ordered to be set down to be argued before the court, themselves depending upon the assumption that such a right could exist in law. On the other hand, Farwell J., a judge peculiarly experienced and learned in real

¹ (1845) 6 Q.B. 904.² (1904) 73 L.J.Ch. 545; 20 T.L.R. 462.

property law, on two occasions, namely, in 1903 in the case of *International Tea Stores Co. v. Hobbs*,³ and in 1905 in *Attorney-General v. Antrobus*,⁴ used language appearing to treat as axiomatic the proposition, that a right, which should properly be described as a *jus spatiandi*, was a right excluded by English law, as by Roman law, from the company of servitudes.

The four cases which we have mentioned must be considered hereafter at greater length. But it can be said at once that, with the possible exception of the first, none of them constitutes or involves a direct decision upon the question now before us: and although the existence of gardens surrounded by houses, the owners or occupiers of which enjoy in practice the amenities of the gardens, is a well-known feature of town development throughout the country, no other case appears to have come before the courts in which the validity of the rights in fact enjoyed in the gardens has ever been tested.

A full statement of the facts of the present case was contained in the judgment of Danckwerts J.⁵ That judgment is reported in the Law Reports. Save in two respects, therefore, we do not think it useful or necessary to set the facts out again in this judgment. But, having regard particularly to certain of the arguments by way of analogy put before us by Mr. Cross, it is necessary to decide what precisely was the nature of the rights which, under the original conveyances, the owners of the estate purported to grant to the purchasers of the relevant plots of land; and what corresponding obligations the vendors undertook. We shall therefore have to examine closely the exact form of the conveyances, one of which has been before the court, and has been accepted by counsel as typical of all the relevant conveyances.

And, secondly, by reason of Mr. Cross's more general argument, based on the alleged absence of the required connexion between the rights to enjoy the garden and the premises themselves (as distinct from the persons of their owners), which are said to constitute the dominant tenements, we must also state precisely, by reference to further evidence filed before us and by our leave, where these premises are situated.

But, before we proceed to those matters of fact, it will be proper, as a foundation for all that follows in this judgment, to attempt a brief account of the emergence in the course of the

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³ [1903] 2 Ch. 165, 172.⁵ Ante, p. 137; [1955] 2 All E.R.⁴ [1905] 2 Ch. 198; 21 T.L.R. 38.

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history of our law, of the rights known to us as "easements," and thereafter, so far as relevant for present purposes, to formulate what can now be taken to be the essential qualities of those rights. For the former purpose we cannot do better than cite a considerable passage from the late Sir William Holdworth's *Historical Introduction to the Land Law* (Clarendon Press, 1927, p. 265). The author states: "Both the term 'easement' and 'the thing itself were known to the mediaeval common law. At the latter part of the sixteenth century it was described in Kitchen's book on courts, and defined in the later editions of 'the *Termes de la Ley*.'" After stating the definition and observing its obvious defects from the point of view of modern law, Sir William proceeds: "But these defects in the definition are instructive, because they indicate that the law as to easements was as yet rudimentary.

"It was still rudimentary when Blackstone wrote. In fact, right down to the beginning of the nineteenth century, there was but little authority on many parts of this subject. Gale, writing in 1839, said: 'The difficulties which arise from the abstruseness and refinements incident to the subject have been increased by the comparatively small number of decided cases affording matter for defining and systematising this branch of the law. Upon some points indeed there is no authority at all in English law.'

"The industrial revolution, which caused the growth of large towns and manufacturing industries, naturally brought into prominence such easements as ways, watercourses, light, and support; and so Gale's book became the starting-point of the modern law, which rests largely upon comparatively recent decisions.

"But, though the law of easements is comparatively modern, some of its rules have ancient roots. There is a basis of Roman rules introduced into English law by Bracton, and acclimatized by Coke. . . . The law, as thus developed, sufficed for the needs of the country in the eighteenth century. But, as it was no longer sufficient for the new economic needs of the nineteenth century, an expansion and an elaboration of this branch of the law became necessary. It was expanded and elaborated partly on the basis of the old rules, which had been evolved by the working of the assize of nuisance, and its successor the action on the case; partly by the help of Bracton's Roman rules; and partly, as Gale's book shows, by the help of the Roman rules taken from the Digest, which he frequently and

“continuously uses to illustrate and to supplement the existing “rules of law.”

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The reference to Sir E. Coke we take to be a reference to Coke upon Littleton, citations from which and criticisms of which will be found, for example, in Gale on Easements, 12th ed., p. 305.

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The passage which we have read from Sir William Holdsworth sufficiently serves to explain the appearance and the prominence of Roman dicta in the English law of easements, commonly called, indeed, by the Latin name of “servitudes”: and it may well be possible that Farwell J.’s rejection of the *jus spatiandi* as a legal right by English law was derived in part from its similar rejection by the law of Rome. Thus, according to the Roman jurist, Paulus (quoted by Gale at p. 19), “*ut spatiari, et ut coenare in aliena possimus, servitus imponi non potest*”: nevertheless, apart from the opinion of Farwell J., there has been, as we have already observed, no judicial authority for adopting the Roman view in this respect into the English law. Moreover, the exact characteristics of the *jus spatiandi* mentioned by the Roman lawyers has to be considered. It by no means follows that the kind of right which is here in question, arising out of a method of urban development that would not have been known to Roman lawyers, can in any case be said to fall within its scope. And, in any event, its validity must depend, in our judgment, upon a consideration of the qualities which must now be attributed to all easements by the law relating to easements as it has now developed in England.

For the purposes of the argument before us Mr. Cross and Mr. Goff were content to adopt, as correct, the four characteristics formulated in Dr. Cheshire’s *Modern Real Property*, 7th ed., pp. 456 et seq. They are (1) there must be a dominant and a servient tenement: (2) an easement must “accommodate” the dominant tenement: (3) dominant and servient owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.

The four characteristics stated by Dr. Cheshire correspond with the qualities discussed by Gale in his second chapter, sections 2, 5, 3, and 6 and 8 respectively. Two of the four may be disregarded for present purposes, namely, the first and the third. If the garden or park is, as it is alleged to be, the servient tenement in the present case, then it is undoubtedly distinct from the alleged dominant tenements, namely, the

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freeholds of the several houses whose owners claim to exercise the rights. It is equally clear that if these lands respectively constitute the servient and dominant tenements then they are owned by different persons. The argument in the case is found, accordingly, to turn upon the meaning and application to the circumstances of the present case of the second and fourth conditions; that is, first, whether the alleged easement can be said in truth to "accommodate" the dominant tenement—in other words, whether there exists the required "connexion" between the one and the other: and, secondly, whether the right alleged is "capable of forming the subject-matter of a grant." The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the "grant," it is not in doubt that rights of this kind would be capable of taking effect by way of contract or licence. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.

It will now be convenient for us to state the terms of the conveyance dated December 23, 1864, and made between Henry Davies and Joseph Whereat of the one part and John Porter of the other part which, as we have said, has been taken for the purposes of the case as typical of all the conveyances.

After a recital of their title to the land to be conveyed, being "part of a certain estate called 'The White Cross Estate,'" the vendors granted and conveyed unto John Porter and his heirs "All that plot . . . of land part of the said White Cross Estate "and situate in the Parish of Weston-super-Mare." There followed an exact description of the land with precise measurements. The description showed that the land fronted on a road called "Crescent Road" and backed upon another road, and that it adjoined another plot belonging to the purchaser, being No. 20, Ellenborough Crescent. The parcels continued: "Together with "the messuage or dwelling-house outbuildings and premises "which are now in course of erection by the said John Porter "on the said plot of land . . . which are intended . . . to form

“No. 21 of the said row called Ellenborough Crescent . . .
 “Together with all ways paths passages easements rights and
 “appurtenances to the said plot of land . . . belonging or apper-
 “taining And particularly the use and enjoyment at all times
 “hereafter in common with the other persons to whom such
 “easements may be granted of the roads called the ‘Crescent
 “‘Road’ and the ‘Walliscote Road’ and of all other roads ways
 “and footpaths and of all drains . . . which shall be made on
 “the said White Cross Estate . . . And also the full enjoyment
 “. . . at all times hereafter in common with the other persons
 “to whom such easements may be granted of the pleasure
 “ground set out and made in front of the said plot of land . . .
 “in the centre of the square called Ellenborough Park which said
 “pleasure ground is divided by the said Walliscote Road but
 “subject to the payment of a fair and just proportion of the
 “costs charges and expenses of keeping in good order and
 “condition the said pleasure ground And all the estate right
 “title” etc.

After the habendum and certain immaterial provisions, John Porter covenanted with the vendors to complete the building of the messuage on the plot conveyed and to do so in accordance with certain specifications and plans “similar in every respect
 “externally and in a uniform manner with the messuage or
 “dwelling-house numbered 1 in the same Crescent.” The covenant in that respect condescended to considerable detail as regards materials and as regards a dwarf wall and iron palisading and was followed by covenants against alteration of the external elevation or structure and against user for trade or commercial purposes (with certain very limited exceptions) without the consent of the vendors or their successors in title. John Porter further covenanted to pay a fair proportion of the expense of maintaining the roads “And also will jointly with all other
 “persons to whom the right of enjoyment of the pleasure ground
 “. . . may be granted to pay a fair proportion of the expenses
 “of making and at all times keeping in good order and condi-
 “tion and well stocked with plants and shrubs the pleasure
 “ground . . .”

Finally, each of the vendors for himself and his successors in title covenanted with the purchaser and his successors in title
 “and all other persons to whom the right of enjoyment of the
 “pleasure ground . . . may be granted at all times hereafter (to)
 “keep as an ornamental pleasure ground the plot of ground
 “hereinbefore referred to and situate in front of and partly

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“encircled by the said Ellenborough Crescent,” and also that they would not at any time thereafter “erect or permit to be erected any dwelling-house and other building (except any grotto bower summer-house flower-stand fountain music-stand or other ornamental erection) within or on any part of the said pleasure ground . . . but that the same shall at all times remain as an ornamental garden or pleasure ground.”

Before we state our view of the meaning and effect of the deed, we will deal with the second matter of fact which we have mentioned, namely, the position of the houses to the grantees of which, according to the fresh evidence filed, the right of user of the pleasure ground or park was given. The exact area of “the White Cross Estate” was not proved: but Ellenborough Park (that is the pleasure ground) and the road round it (Ellenborough Crescent or Crescent Road) is a rectangular area measuring about 350 yards from east to west and about 100 yards from north to south, its western boundary facing the sea. The right was granted to the purchasers of each of the plots of land the houses on which face inwards round the Crescent Road into the park; but it was also granted in respect of some 9 or 10 other plots not actually facing into the park but separated from the Crescent Road only by houses so fronting. There appear to be no private ways from the houses built on these other plots direct to the Crescent Road and the park. Access in these cases to the park has to be obtained by the short distance over the ordinary roads, in no case more than about 150 or 200 yards. It does not appear what, if any, special obligations were imposed upon the original purchasers of these last few houses as regards the character of the houses and the like.

Omitting, for the moment, these last-mentioned few houses, it is clear from the deed from which we have quoted, and from the other deeds in like form made (as must be assumed), in respect of the remaining premises in Ellenborough Crescent, that the original common vendors were engaged upon a scheme of development of this part of the White Cross Estate designed to produce a result of common experience; namely, a row of uniform houses facing inwards upon a park or garden which was intended to form, and formed in fact, an essential characteristic belonging, and properly speaking “appurtenant,” to all and each of them. In substance, instead of each house being confined to its own small or moderate garden, each was to enjoy in common, but in common exclusively with the other houses in the Crescent, a single large “private” garden. In our judgment the substance

of the matter is not in this respect affected by the fact that some few houses in the immediate proximity of, but not actually fronting upon, the park were also entitled to share the privilege. This extension of the privilege may no doubt be unusual and (at first sight at any rate) out of line with the conception of the square and its surrounding houses as a symmetrical unit. It has therefore a bearing upon the question of the "connexion" between the right enjoyed and the premises of the relevant house owners; and must be discussed under the head of Dr. Cheshire's second condition. But, in our judgment, the language of the deed of 1864 is clearly to the effect that the right of enjoyment of the garden was intended to be annexed to the premises sold, rather than given as a privilege personal to their purchaser. The enjoyment was not exclusive to those premises alone; it was to be held in common with the like rights annexed to the other houses in (and in some few cases in close proximity to) the square or crescent. But it was not contemplated that like rights should be otherwise extended so as to belong in any sense to premises not forming part of (or at least closely connected with) the square or their owners. The position of the grant in the deed and its language show that, in the respects we have mentioned, the right granted was intended and treated as in *pari materia* with the rights of way and drainage similarly conferred. The relevant part of the deed opens with the general formula "Together with all ways . . . easements rights and appurtenances to the said plot of land . . . appertaining." The rights of way (admittedly easements properly so called) follow immediately the general formula, being linked to it by the words "and particularly." The next two words are "And also," which, in turn, introduce the garden rights now in question in language which repeats the phrase used in relation to the rights of way—"in common with the other persons to whom such easements may be granted."

In our judgment, if the construction of this part of the deed does not tend to the conclusion that the garden rights, like the rights of way, were particular examples of the general grant of easements and rights appurtenant to the plot conveyed, it is at least made clear that the garden rights were (so far, of course, as they properly could be) of the same character, quoad the land conveyed, as the rights of way and drainage. It was conceded that the rights, if effectual and enforceable, were conditional; that is, upon the house owners making their appropriate contributions to the cost of upkeep. In this respect, again, they were analogous, by the terms of the deed, to the rights of way over

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Crescent and Walliscote Roads. As a complement to the rights of enjoyment of the garden, subject to the condition of contribution, was the covenant by the vendors against building on the park and to the effect that the park should at all times remain as an ornamental garden. Mr. Cross did not seriously challenge Mr. Goff's contention that, in their context, the words of the covenant to which we have last referred could fairly be construed as implying a negative covenant on the vendors' part against any user by them of the park otherwise than as a garden. There is clear authority that, if such be the substantial effect of the covenant, its benefit and burden will run with the land. The last consideration appreciably reinforces the view which we take of the meaning and intention of the deed, to attach the garden rights in all respects like the rights of way and drainage to the land conveyed.

It remains to interpret the actual terms of the grant itself—"the full enjoyment of the pleasure ground set out and made," etc. Mr. Cross fastened upon the presence of the word "full," and the absence of any indication of the way in which the pleasure ground was to be used—or of any limitations upon its use—and contended that the right or privilege given was a *jus spatiandi* in its strict sense, that is, a right to go or wander upon the park and every part of it and enjoy its amenities (and even its produce) without stint. We do not so construe the words in their context. Although we are now anticipating to some extent the question which arises under the fourth of Dr. Cheshire's conditions, it seems to us, as a matter of construction, that the use contemplated and granted was the use of the park as a garden, the proprietorship of which (and of the produce of which) remained vested in the vendors and their successors. The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such—the right, that is to say, of walking on or over those parts provided for such purpose, that is, pathways and (subject to restrictions in the ordinary course in the interest of the grass) the lawns; to rest in or upon the seats or other places provided; and, if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, subject again, in the ordinary course, to the provisions made for their regulation; but not to trample at will all over the park, to cut or pluck the flowers or shrubs, or to interfere in the laying out or upkeep of the park. Such use or enjoyment is, we think, a common and clearly understood conception, analogous to the use and enjoyment conferred upon

members of the public, when they are open to the public, of parks or gardens such as St. James's Park, Kew Gardens or the Gardens of Lincoln's Inn Fields. In our judgment, the use of the word "full" does not import some wider, less well understood or less definable privilege. The adjective does not in fact again appear when the enjoyment of the garden is later referred to. It means no more than that to each plot was annexed the right of enjoyment of the park as a whole—notwithstanding that it was divided by Walliscote Road. Nor does any difficulty arise out of the condition as to contribution, and Mr. Cross did not, indeed, so suggest. The obligation being a condition of the enjoyment, each house would be bound to contribute its due (that is, proportionate) share of the reasonable cost of upkeep.

We do not forget that, as was proved in the evidence, an arrangement was made in the year 1924 between the then owners of the park and the householders concerned for regulating, in a mutually convenient way, the future management and upkeep of the garden, and for meeting its cost. Whether such arrangement had or still has any, and if so, what, legal effect is a question that has not been considered before us, and upon which we express no view. We have been concerned with the proper interpretation of the original deeds of grant. If these were effective upon their true construction (as must now be considered) to confer legal and enforceable rights capable of passing to the hands of the respondent or those he represents, and being available against the plaintiffs, it is not suggested that these rights have since been varied or lost by any virtue of the arrangement of 1924 or any other act of the persons at any time interested in such rights.

We pass, accordingly, to a consideration of the first of Dr. Cheshire's conditions—that of the accommodation of the alleged dominant tenements by the rights as we have interpreted them. For it was one of the main submissions by Mr. Cross on behalf of the appellant that the right of full enjoyment of the park, granted to the purchaser by the conveyance of December 23, 1864, was insufficiently connected with the enjoyment of the property conveyed, in that it did not subserve some use which was to be made of that property; and that such a right accordingly could not exist in law as an easement. In this part of his argument Mr. Cross was invoking a principle which is, in our judgment, of unchallengeable authority, expounded, in somewhat varying language, in many judicial utterances, of

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which the judgments in *Ackroyd v. Smith*⁶ are, perhaps, most commonly cited. We think it unnecessary to review the authorities in which the principle has been applied; for the effect of the decisions is stated with accuracy in Dr. Cheshire's *Modern Real Property*, 7th ed., at p. 457. After pointing out that "one of the fundamental principles concerning easements" is that they must be not only appurtenant to a dominant tenement, but also connected with the normal enjoyment of "the dominant tenement" and referring to certain citations in support of that proposition the author proceeded: "We may expand the statement of the principle thus: a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connexion therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties." In the course of the argument before us it was suggested that the principle thus formulated lacked completeness having regard to the judgment of Willes J. in *Bailey v. Stephens*.⁷ The effect of the decision of the Court of Common Pleas in that case is sufficiently stated in the sidenote, which is as follows: "A claim of a prescriptive right in the owners or occupiers of close A to enter close B (belonging to a third person), and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon, 'as to the said 'close A appertaining' is void, as being too large.'" In the course of his judgment Willes J., after referring to *Muskett v. Hill*,⁸ said that a grant to a man to carry away for his own use trees on another's land, which he had been licensed to cut down, constituted an interest which was assignable, but that such a grant could only be made in gross. The judge then proceeded as follows⁹: "They" (that is, such grants) "convey an interest to the grantees, which grantees, if they wish to convey, must convey by the ordinary conveyances known to the law: and it is not because the grantee may happen to be the owner of the close at the time at which the grant is made to him, that such a conveyance may be dispensed with in favour of the person who may from time to time thereafter become the

⁶ (1850) 10 C.B. 164.⁸ (1839) 5 Bing.N.C. 694.⁷ (1862) 12 C.B.N.S. 91.⁹ 12 C.B.N.S. 91, 111.

“ owner of the freehold of the close, or take the licence of the
 “ owner of the freehold in the close. And the reason is a simple
 “ one, and it will be found in that class of cases now not often
 “ referred to, because the law depends principally on the Statute
 “ of Henry the Eighth. I mean the case of a conveyance by
 “ which a certain incident is granted which, though beneficial
 “ to the grantee of the land so long as he remains the owner
 “ of it, and beneficial in respect of his ownership of the land,
 “ can be of no benefit to any other person. And the authorities
 “ are to this effect that, at common law, a benefit of that descrip-
 “ tion went into whosoever hands the land might pass . . . But,
 “ in order to enable the assignee of the land to take advantage
 “ of such a benefit, it must be a benefit falling within the defini-
 “ tion I have given—a definition frequently given with reference
 “ to the question whether a covenant runs with a reservation in
 “ cases arising under the Statute of Henry the Eighth, whether
 “ it was beneficial to the land and beneficial in respect of the
 “ ownership of the land, and not beneficial to any other person.”

It will be observed that in this judgment Willes J. twice incorporated, in his definition of incidents which run with the land, that they were not (or could not be) of benefit to persons other than the grantees thereof; and Mr. Cross submitted that the judge was intending to indicate that this isolation of benefit constitutes an essential ingredient of every right granted to a purchaser over the vendor's land, if it is to qualify as an easement which the law will recognize. If Willes J. did in fact intend to introduce this qualification, and if he were right in doing so, the appellant would be much assisted in the present case; for it is clear that a right to use and enjoy the amenities of Ellenborough Park could be appreciated by and could benefit many inhabitants of Weston-super-Mare besides the persons to whom in fact the right was granted. We do not think, however, that Willes J. was intending to say that the right of a man to use another person's property for the purposes of his own estate cannot amount to an easement, unless it is incapable of being in fact enjoyed by anyone other than the grantee of the right. He began his judgment by expressing his concurrence in the judgment which Erle C.J. had just delivered, and the chief justice had made no reference to this element at all. The chief justice had, however, drawn a distinction between, on the one hand, a claim appurtenant to land to go upon another's estate and take the produce without reference to the needs and requirements of the claimant's own land and, on the other hand, the

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claim by an owner of an estate to go upon adjoining land and take certain of the profits to be used at the house and in the tenement of the claimant; and the Chief Justice had said that the first of these claims would not be sustained in law as an easement, whereas the second of them would be. In our judgment Willes J., in expressing himself as he did, had a similar distinction in mind and was merely emphasizing that an easement must be appurtenant to an estate for the benefit of that estate and its owner and that it cannot at the same time lawfully be enjoyed by any other person. If, however, the judge was intimating that, if a right be of such a character that it can factually (as distinct from lawfully) be of benefit to persons other than the owner of the estate to whom the right is granted, it is incapable of legal recognition as an easement, the judge was enunciating a principle which, so far as we are aware, has no other authority to support it. It is true that the observations of Willes J. were quoted without disapproval by Hamilton L.J. in *Attorney-General v. Horner* (No. 2),¹⁰ but there is no reason to suppose that the particular point which we are now considering received his attention, for the point was as unnecessary for the determination of the case which was before him as it was, in fact, for the determination of *Bailey v. Stephens*¹¹ itself. Willes J.'s judgment was also briefly referred to by Lord Hanworth M.R. in *Todrick v. Western National Omnibus Co. Ltd.*¹²; but as to this it is to be observed that, if he or Romer and Maugham L.JJ., who sat with him, had regarded the language of Willes J. as establishing the principle now in question, it is difficult to imagine why they expressed no view upon it; for it would have been directly relevant to the decision of the court. The effect of that decision, so far as material to present purposes, was that a right to use a way as appurtenant to land can exist as an easement, even though the dominant tenement is not one of the termini of the way. It is clear that such a way is capable of benefiting any passer-by, wholly unconnected with the dominant tenement, who chooses to use it as a short cut; nevertheless, this court held that a way of this kind could constitute an easement. In our judgment, accordingly, the statement of the law in Dr. Cheshire's book, to which we have referred, is unaffected by the judgment of Willes J. in *Bailey v. Stephens*.¹³

¹⁰ [1913] 2 Ch. 140, 196; 29 T.L.R. 451.

¹¹ 12 C.B.N.S. 91.

¹² [1934] Ch. 561, 573.

¹³ 12 C.B.N.S. 91.

Can it be said, then, of the right of full enjoyment of the park in question, which was granted by the conveyance of December 23, 1864, and which, for reasons already given, was, in our view, intended to be annexed to the property conveyed to Mr. Porter, that it accommodated and served that property? It is clear that the right did, in some degree, enhance the value of the property, and this consideration cannot be dismissed as wholly irrelevant. It is, of course, a point to be noted; but we agree with Mr. Cross's submission that it is in no way decisive of the problem; it is not sufficient to show that the right increased the value of the property conveyed, unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted. As to the former, it was in the contemplation of the parties to the conveyance of 1864 that the property conveyed should be used for residential and not commercial purposes. That appears from the conveyance itself, and the covenant by the purchaser already quoted, that the dwelling-house, etc., which he bound himself to build should not "be occupied or used as an open or exposed shop or for any purpose of trade or commerce other than a lodging-house or private school or seminary" without the vendor's written consent. Since it is stated in paragraph 4 of Mr. Rendell's affidavit in support of the summons, and has been conceded that all the conveyances of plots for building purposes fronting or near Ellenborough Park were as regards (*inter alia*) user substantially the same as the conveyance of 1864, the inevitable inference is that the houses, which were to be built upon the plots, were to constitute a residential estate. As appears from the map, the houses, which were built upon the plots around and near to Ellenborough Park, varied in size, some being large detached houses and others smaller and either semi-detached or in a row. We have already stated that the purchasers of all the plots, which actually abutted on the park, were granted the right to enjoy the use of it, as were also the purchasers of some of the plots which, although not fronting upon the park, were only a short distance away from it. As to the nature of the right granted, the conveyance of 1864 shows that the park was to be kept and maintained as a pleasure ground or ornamental garden, and that it was contemplated that it should at all times be kept in good order and condition and well stocked with plants and shrubs; and the vendors covenanted that they

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would not at any time thereafter erect or permit to be erected any dwelling-house or other building (except a grotto, bower, summer-house, flower-stand, fountain, music-stand or other ornamental erection) within or on any part of the pleasure ground. On these facts Mr. Cross submitted that the requisite connexion between the right to use the park and the normal enjoyment of the houses which were built around it or near it had not been established. He likened the position to a right granted to the purchaser of a house to use the Zoological Gardens free of charge or to attend Lord's Cricket Ground without payment. Such a right would undoubtedly, he said, increase the value of the property conveyed but could not run with it at law as an easement, because there was no sufficient nexus between the enjoyment of the right and the use of the house. It is probably true, we think, that in neither of Mr. Cross's illustrations would the supposed right constitute an easement, for it would be wholly extraneous to, and independent of, the use of a house as a house, namely, as a place in which the householder and his family live and make their home; and it is for this reason that the analogy which Mr. Cross sought to establish between his illustrations and the present case cannot, in our opinion, be supported. A much closer analogy, as it seems to us, is the case of a man selling the freehold of part of his house and granting to the purchaser, his heirs and assigns, the right, appurtenant to such part, to use the garden in common with the vendor and his assigns. In such a case, the test of connexion, or accommodation, would be amply satisfied; for just as the use of a garden undoubtedly enhances, and is connected with, the normal enjoyment of the house to which it belongs, so also would the right granted, in the case supposed, be closely connected with the use and enjoyment of the part of the premises sold. Such, we think, is in substance the position in the present case. The park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close proximity. Its flower beds, lawns and walks were calculated to afford all the amenities which it is the purpose of the garden of a house to provide; and, apart from the fact that these amenities extended to a number of householders, instead of being confined to one (which on this aspect of the case is immaterial), we can see no difference in principle between Ellenborough Park and a garden in the ordinary signification of that word. It is the collective garden of the neighbouring houses, to whose use it was dedicated by the owners of the

estate and as such amply satisfied, in our judgment, the requirement of connexion with the dominant tenements to which it is appurtenant. The result is not affected by the circumstance that the right to the park is in this case enjoyed by some few houses which are not immediately fronting on the park. The test for present purposes, no doubt, is that the park should constitute in a real and intelligible sense the garden (albeit the communal garden) of the houses to which its enjoyment is annexed. But we think that the test is satisfied as regards these few neighbouring, though not adjacent, houses. We think that the extension of the right of enjoyment to these few houses does not negative the presence of the necessary "nexus" between the subject-matter enjoyed and the premises to which the enjoyment is expressed to belong.

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Mr. Cross referred us to, and to some extent relied upon, *Hill v. Tupper*,¹⁴ but in our opinion there is nothing in that case contrary to the view which we have expressed. In that case, the owner of land adjoining a canal was granted the exclusive right to let boats out for hire on the canal. He did so and then sought to restrain a similar activity by a neighbouring landowner. He sought to establish that his grant constituted an easement but failed. Pollock C.B. said in his judgment¹⁵: "It is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in 'the grantee.'" It is clear that what the plaintiff was trying to do was to set up, under the guise of an easement, a monopoly which had no normal connexion with the ordinary use of his land, but which was merely an independent business enterprise. So far from the right claimed sub-serving or accommodating the land, the land was but a convenient incident to the exercise of the right.

For the reasons which we have stated, we are unable to accept the contention that the right to the full enjoyment of Ellenborough Park fails in limine to qualify as a legal easement for want of the necessary connexion between its enjoyment and the use of the properties comprised in the conveyance of 1864, and in the other relevant conveyances.

We turn next to Dr. Cheshire's fourth condition for an easement—that the right must be capable of forming the subject-matter of a grant. As we have earlier stated, satisfaction of the condition in the present case depends on a consideration of the questions whether the right conferred is too wide and vague,

¹⁴ (1863) 2 H. & C. 121.¹⁵ *Ibid.* 127.

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whether it is inconsistent with the proprietorship or possession of the alleged servient owners, and whether it is a mere right of recreation without utility or benefit.

To the first of these questions the interpretation which we have given to the typical deed provides, in our judgment, the answer; for we have construed the right conferred as being both well defined and commonly understood. In these essential respects the right may be said to be distinct from the indefinite and unregulated privilege which, we think, would ordinarily be understood by the Latin term "*jus spatiandi*," a privilege of wandering at will over all and every part of another's field or park, and which, though easily intelligible as the subject-matter of a personal licence, is something substantially different from the subject-matter of the grant in question, namely, the provision for a limited number of houses in a uniform crescent of one single large but private garden.

Our interpretation of the deed also provides, we think, the answer to the second question; for the right conferred no more amounts to a joint occupation of the park with its owners, no more excludes the proprietorship or possession of the latter, than a right of way granted through a passage, or than the use by the public of the gardens of Lincoln's Inn Fields (to take one of our former examples) amount to joint occupation of that garden with the London County Council, or involve an inconsistency with the possession or proprietorship of the council as lessees. It is conceded that, in any event, the plaintiff owners of the park are entitled to cut the timber growing on the park and to retain its proceeds. We have said that in our judgment, under the deed, the flowers and shrubs grown in the garden are equally the park owners' property. We see nothing repugnant to a man's proprietorship or possession of a piece of land that he should decide to make it and maintain it as an ornamental garden, and should grant rights to a limited number of other persons to come into it for the enjoyment of its amenities.

Mr. Cross relied, upon this part of his case, on the recent decision of *Copeland v. Greenhalf*¹⁶ and the ratio of Upjohn J.'s judgment. The relevant facts were that a claim was made to a prescriptive right to deposit and leave, for an indefinite time, vehicles upon an undefined part of a strip of land which was subject to a right of way. It appeared that the claimant was by trade a wagon repairer and that the vehicles were deposited by him on the land in the course of his business and while

¹⁶ [1952] Ch. 488; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809.

awaiting repairs. It further appeared that wagons were commonly repaired while remaining so deposited. On these facts the judge—very justifiably (if we may say so)—found that the claimant was occupying and seeking the right to occupy an unspecified part of the land for the purpose of his business, and carrying on such business upon the land so occupied. “I think,” said the judge,¹⁷ “that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription.” ✓

We do not think that the facts of *Copeland v. Greenhalf*¹⁷ bear any real relation to the present case, and Upjohn J.’s judgment constitutes no authority relevant to our decision.

The third of the questions embraced in Dr. Cheshire’s fourth condition rests primarily on a proposition stated in Theobald’s *The Law of Land*, 2nd ed. (1929), at p. 263, where it is said that an easement “must be a right of utility and benefit and not one of mere recreation and amusement.” It does not appear that a proposition in similar terms is stated by Gale. The passage in Theobald is justified by reference to two cases: *Mounsey v. Ismay*,¹⁸ and *Solomon v. Vintners Co.*¹⁹ The second of these cases was concerned with a right of support, and appears only to be relevant for present purposes on account of

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¹⁷ [1952] Ch. 488, 498.¹⁹ (1859) 4 H. & N. 585, 593.¹⁸ (1865) 3 H. & C. 486, 498.

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an intervention in the course of the argument on the part of Pollock C.B. and Baron Bramwell, in which it was suggested that one who had for a long period played rackets against the wall of a neighbour would have a right not to have the wall pulled down. We were also referred in argument to the Scottish case in the House of Lords of *Dyce v. Lady James Hay*,²⁰ and to the earlier case before Lord Eldon therein referred to of *Dempster v. Cleghorn*.²¹ The former of these two cases was concerned with a claim on the part of the inhabitants of Aberdeen to roam at will over a piece of land bordering upon the River Don, and for such purpose to use every part of the land to the practical exclusion of any right of user on the part of the owner. The case was therefore one involving what could strictly be called a claim by a large and ill-defined number of people to a *jus spatiandi*. In Lord Eldon's case (in which the only decision was to refer the matter back to the Court of Session), the dispute was between certain persons, inhabitants of the City of St. Andrews and others, claiming the right of playing golf on the St. Andrews' Golf Links, and a tenant whose rabbits were said to be interfering with the proper maintenance of the golf course. Lord Eldon observed that the case had excited great warmth of feeling—which indeed may sufficiently appear from the allegation that some of the rabbits on the course were English rabbits. Neither that case nor the case of *Dyce v. Lady James Hay*²² appear to us to lend real support to the proposition stated by Theobald, at least in its application to such a case as the present.

But the observations of Martin B., who delivered the judgment of the court in *Mounsey v. Ismay*²³ (the first case mentioned in Theobald), are much more to the point. The case concerned a claim under the Prescription Act for the freemen and citizens of a town on a certain day to enter upon a close for the purpose of holding horse races thereon. The opinion of the court was that the right claimed failed, in any event, to qualify as an easement by reason of the absence of a dominant tenement. Baron Martin considered, without deciding, the question whether an easement of the kind claimed could in any case exist as an easement in gross: and proceeded as follows: "But, however this may be, we are of opinion that to bring the right within the term 'easement' in the second section (of the Prescription Act) it must be one analogous to that of a right of way which precedes it and a right of watercourse

²⁰ (1852) 1 Macq. 305.²¹ (1813) 2 Dow 40.²² 1 Macq. 305.²³ 3 H. & C. 486.

“ which follows it, and must be a right of utility and benefit
 “ and not one of mere recreation and amusement.”

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The words which we have quoted were used in reference to a claim for a right to conduct horse races and, in our judgment, the formula adopted by Theobald should be read in the light of that circumstance. In any case, if the proposition be well-founded, we do not think that the right to use a garden of the character with which we are concerned in this case can be called one of mere recreation and amusement, as those words were used by Martin B. No doubt a garden is a pleasure—on high authority, it is the purest of pleasures—but, in our judgment, it is not a right having no quality either of utility or benefit as those words should be understood. The right here in suit is, for reasons already given, one appurtenant to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such domestic purposes as were suggested in argument—for example, for taking out small children in perambulators or otherwise—is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to which it is attached. If Baron Martin's test is applied, the right in suit is, in point of utility, fairly analogous to a right of way passing over fields to, say, the railway station, which would be none the less a good right, even though it provided a longer route to the objective. We think, therefore, that the statement of Baron Martin must at least be confined to exclusion of rights to indulge in such recreations as were in question in the case before him, horse racing or perhaps playing games, and has no application to the facts of the present case.

As appears from what has been stated earlier, the right to the full enjoyment of Ellenborough Park, which was granted by the 1864 and other relevant conveyances, was, in substance, no more than a right to use the park as a garden in the way in which gardens are commonly used. In a sense, no doubt, such a right includes something of a *jus spatiandi*, inasmuch as it involves the principle of wandering at will round each part of the garden, except of course, such parts as comprise flower beds, or are laid out for some other purpose, which renders walking impossible or unsuitable. We doubt, nevertheless, whether the right to use and enjoy a garden in this manner can with accuracy be said to constitute a mere *jus spatiandi*.

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Wandering at large is of the essence of such a right and constitutes the main purpose for which it exists. A private garden, on the other hand, is an attribute of the ordinary enjoyment of the residence to which it is attached, and the right of wandering in it is but one method of enjoying it. On the assumption, however, that the right now in question does constitute a *jus spatiandi*, or that it is analogous thereto, it becomes necessary to consider whether the right, which is in question in these proceedings, is, for that reason, incapable of ranking in law as an easement.

Farwell J. twice indicated that in his opinion the *jus spatiandi* is an interest which is not known to our law; and we think it is true to say that this principle has been widely accepted in the profession without sufficient regard being had, perhaps, to the exact language in which Farwell J. expressed himself or the circumstances in which his view of the matter was propounded. The first of the two cases, in which he intimated that a *jus spatiandi* is not known to the law, was *International Tea Stores Co. v. Hobbs*.²⁴ The actual decision in that case had nothing to do with a *jus spatiandi*, nor did the facts before the judge require of themselves any pronouncement by him upon that subject. The question which was in issue was whether the right or privilege of using a way by a lessee over the land of his lessor passed under section 6 of the Conveyancing Act, 1881, upon a subsequent conveyance to the lessee of the demised property, notwithstanding that the enjoyment of the way had been wholly permissive and precarious. That being the issue, it is not surprising that the arguments of counsel on both sides, as reported in the Law Reports, did not travel outside it. It appears, however, from Farwell J.'s judgment that, in the course of Lord Coleridge's submission on behalf of the defendant that the user by the lessee of the way had been merely permissive and precarious and was therefore outside the scope of section 6, he had introduced a right of user of a park and gardens as an illustration of the argument which he was presenting. Farwell J. in his judgment described and dealt with the illustration as follows²⁵: "But then Lord Coleridge says that such use was wholly permissive. . . . In all these cases the right of way must be either licensed or unlicensed. If it is unlicensed it would be at least as cogent an argument to say, 'True you went there, but it was precarious, because I could have sent a man to stop you or

²⁴ [1903] 2 Ch. 165.

²⁵ *Ibid.* 171.

“ ‘stopped you myself any day.’ If it is by licence, it is precarious of course in the sense that the licence, being ex hypothesi revocable, might be revoked ‘at any time; but if there be degrees of precariousness, the latter is less precarious than the former. But, in my opinion, precariousness has nothing to do with this sort of case, where a privilege which is by its nature known to the law—namely, a right of way—has been in fact enjoyed. Lord Coleridge’s argument was founded upon a misconception of a judgment of mine in *Burrows v. Lang*,²⁶ where I was using the argument of precariousness to shew that the right which was desired to be enjoyed there was one which was unknown to the law—namely, to take water if and whenever the defendant chose to put water into a particular pond; such a right does not exist at law; but a right of way is well known to the law. The instance suggested by Lord Coleridge in his argument illustrates my meaning; he put the case of a man living in a house at his landlord’s park gates, and having leave to use and using the drive as a means of access to church or town, and to use and using the gardens and park for his enjoyment, and asked, ‘Would such a man on buying the house with the rights given by section 6 of the Conveyancing Act acquire a right of way over the drive, and a right to use the gardens and park? My answer is ‘Yes’ to the first, and ‘No’ to the second question, because the first is a right the existence of which is known to the law, and the latter, being a mere jus spatiiandi, is not so known.’”

Farwell J. was a judge of great learning and all his judicial utterances merit and are accorded more than ordinary respect; but in his, as in all, judgments more weight should be attached to that which was necessary for the decision of the case than to that which was merely obiter. It is plain that Farwell J.’s reference, in the passage quoted, to the jus spatiiandi formed no necessary part of his judgment, and it is to be noted that he did not refer to any authority in support of it. It must nevertheless be conceded that in the view of a very learned judge the right of a man to use, as appurtenant to his own property, the gardens and park of another is a right the existence of which is not known to the law, even though that right be expressly granted.

The second of the two cases in which the jus spatiiandi was considered by Farwell J. was *Attorney-General v. Antrobus*.²⁷ That was an action which was brought by the Attorney-General

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²⁶ [1901] 2 Ch. 502; 17 T.L.R. 514. ²⁷ [1905] 2 Ch. 188.

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at the relation of the chairman of the local parish council and certain gentlemen interested in the preservation of public rights in open spaces and footpaths against the then owner of the land upon which Stonehenge stands, for an order for the removal of certain fences which the defendant had erected round Stonehenge. It will be seen accordingly that the object of the action was to establish public, as distinct from private, rights; and the public rights, as so asserted, were to have free access to Stonehenge by means of roads running up to and through the same, such rights being founded upon an alleged trust, created by a lost grant or declaration or by lost statute, for the free user by the public of Stonehenge as a place of resort and for the free access of the public thereto by means of the said roads. At the trial, as appears from the judgment of Farwell J., the plaintiffs produced no evidence that Stonehenge was subject to a trust for its free user by the public but asked the court to presume a lost grant or statute because for many years past the public had been in the habit of visiting the place. This the judge declined to do. He found, as a fact, that there had, for many years past, been a large amount of traffic to Stonehenge as the end and object of the journey; that the journeys had been made for the purpose of visiting the stones and of staying there for such period as each visitor might find pleasant for the purposes of inspection, instruction and general enjoyment. In refusing to presume a lost grant or statute conferring on the public the right of free user of Stonehenge the judge said ²⁸: "... it is impossible for the court "... to make any such presumption as is suggested. The "public as such cannot prescribe, nor is *jus spatiandi* known to "our law as a possible subject-matter of grant or prescription: "'and for such things as can have no lawful beginning, nor be "'created at this day by any manner of grant, or reservation, or "'deed that can be supposed, no prescription is good.'" Later he said ²⁹: "The right of walking around and inspecting the "stones is not one which could be the subject-matter of a grant." Later in his judgment, when considering whether certain of the tracks which led to Stonehenge were public highways, he said ³⁰: "The whole object of the journeys was to see the stones, and "as there can be no legal right of visiting, walking about, and "inspecting the stones in the public, these visits must be deemed "to have been by the permission of the owner. . . . Further, "the tracks which lead in to the circle cease there and do not

²⁸ [1905] 2 Ch. 188, 198.³⁰ *Ibid.* 205.²⁹ *Ibid.* 199.

“cross, and the public have no *jus spatiani* or *manendi* within “the circle. The claim, therefore, is to use tracks which in fact “lead nowhere.” Now it is quite true that in this judgment Farwell J. said that the *jus spatiani* is not “known to our law “as a possible subject-matter of grant or prescription” and that this formula is on its face wide enough to exclude the purported grant in express terms of such a right to a purchaser as appurtenant to his property. But no such grant was in question in the case, which was solely concerned with the alleged rights of the public as a whole; and, in our judgment, the judge was addressing his mind to those rights and to those alone, and he held that, as they could not be the subject-matter of a grant, he was unable to presume a lost grant which purported to create them. He held also that a *jus spatiani* cannot be acquired by public user as an easement, and this is clearly so, if only for the reason that there can be no dominant tenement to which the easement could be said to be appurtenant. It does not necessarily follow from this, however, that no such *jus* could be acquired by individuals by prescription, and still less does it follow (which is the material point for present purposes) that no such *jus* could be created in favour of an individual for the better enjoyment of his property by a grant which was express in its terms. As in the *International Tea Stores* case³¹ so in *Attorney-General v. Antrobus*,³² Farwell J. refrained from citing authority in support of his observations with regard to the *jus spatiani*. *

It will be noted that in both of these cases the judge said that a *jus spatiani* is “not known to our law” and the question arises as to what precisely he meant by using that phrase. He may have meant: (a) that it was unknown to our law, because it found no place in the Roman law of servitudes; (b) that it was repugnant to the ownership of land that other persons should have rights of user over the whole of it; (c) that the law will not recognize rights to use a servient tenement for the purposes of mere recreation and pleasure; or (d) that such rights are too vague and uncertain to be capable of definition. Which of these meanings the judge had in mind it is difficult to know; and indeed, he may have had some other meaning. If, however, one attributes to the phrase “not known to the law” its ordinary signification, namely, that it was a right which our law had refused to recognize, it is clear, we think, that he would at least have expressed himself in less general terms had his attention

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³¹ [1903] 2 Ch. 165.³² [1905] 2 Ch. 188.

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been drawn to *Duncan v. Louch*.³³ That case was not, however, cited to him in either the *International Tea Stores* case³⁴ or in *Attorney-General v. Antrobus*³⁵ for the sufficient reason that it was not relevant to any issue that was before the judge upon the questions which arose for decision. There is no doubt, in our judgment, but that *Attorney-General v. Antrobus*³⁵ was rightly decided; for no right can be granted (otherwise than by Statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription. We doubt very much whether Farwell J. had in mind, notwithstanding the apparent generality of his language, a so-called *jus spatii* granted as properly appurtenant to an estate; for the whole of his judgment was devoted to a consideration of public rights; and, although this cannot be said of his observations as to the gardens and park in the *International Tea Stores* case,³⁶ the view which he there expressed was entirely obiter upon a point which was irrelevant to the case and had not been argued. Inasmuch, therefore, as this observation is unsupported by any principle or any authority that are binding upon us, and is in conflict with the decision in *Duncan v. Louch*,³⁷ we are unable to accept its accuracy as an exhaustive statement of the law and, in reference, at least, to a case such as that now before the court, it cannot, in our judgment, be regarded hereafter as authoritative.

Duncan v. Louch,³⁷ on the other hand, decided more than 100 years ago but not, as we have observed, quoted to Farwell J. in either of the two cases which we have cited, is authoritative in favour of the recognition by our law as an easement of a right closely comparable to that now in question which, if it involves in some sense a *jus spatii*, is nevertheless properly annexed and appurtenant to a defined hereditament.

*Duncan v. Louch*³⁷ was an action brought by the plaintiff as owner of premises No. 15, Buckingham Gate, Adelphi, London, on account of obstruction by the defendant of what the plaintiff alleged to be a right of way from Buckingham Gate over or across Terrace Walk to a watergate on the Thames River. On the trial before Wightman J. it was objected on the defendant's part that, though the plaintiff had alleged a right of way from terminus to terminus, the right which he had in fact proved under his documents of title was a right to use Terrace Walk for the purposes

³³ 6 Q.B. 904.³⁴ [1903] 2 Ch. 165.³⁵ [1905] 2 Ch. 188.³⁶ [1903] 2 Ch. 165.³⁷ 6 Q.B. 904.

of pleasure, that is, to pass and repass over every part of the close. The objection was overruled by the trial judge. The plaintiff showed cause before the Queen's Bench why the rule nisi obtained by the defendant for a verdict in his favour should be discharged; and the matter, as so often was the case in like circumstances, strictly turned upon the narrow question whether the alleged variance between the allegation and the proof was fatal to the plaintiff's case. The decision in the plaintiff's favour was to the effect that, although the right proved exceeded the allegation, nevertheless the former necessarily embraced the latter.

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The argument on the defendant's part thus appears from the report³⁸: "If this be a right of way, it is a right only of using the way for the purpose of passing from terminus to terminus, and not of walking for pleasure between the intermediate points. But the right is in fact one of a kind altogether different. It is like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the owners and tenants of the houses of walking about the garden, on condition of keeping it in order." Whether Mr. Peacock's argument assumed that such a right as he had cited by way of analogy was one recognized by the law, Lord Denman C.J., in his judgment, in terms, so held. "I think," he said,³⁹ "there is no doubt in this case. Taking the right, as Mr. Peacock suggests, to be like the right of the inhabitants of a square to walk in the square for their pleasure . . . I cannot doubt that, if a stranger were to put a padlock on the gate and exclude one of the inhabitants, he might complain of the obstruction." Similarly, Patteson J.⁴⁰: "I do not understand the distinction that has been contended for between a right to walk, pass and repass forwards and backwards over every part of a close, and a right of way from one part of the close to another. What is a right of way but a right to go forwards and backwards from one place to another?" And Coleridge J., in his judgment, described the right proved as an "easement."

The reasoning of the decision and the circumstances of the case, no less than the language used, particularly by Lord Denman C.J., involve acceptance as an easement of a right such as that with which, according to our interpretation of the effect of the relevant deeds, we are here concerned.

³⁸ 6 Q.B. 904, 910.⁴⁰ Ibid.³⁹ Ibid. 913.

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The remaining one of the four cases mentioned at the beginning of this judgment, *Keith v. Twentieth Century Club*,⁴¹ is, however, in our view, of much less assistance. There, the plaintiffs were owners and occupiers of two rows of houses in London and claimed the right to use the garden between these rows. The plaintiffs sought in the action an injunction to restrain the defendants (who were owners of certain other houses in one of the rows and carried on the business there of a Proprietary Ladies' Club) from authorizing members of the club to use the garden: and the questions formulated by Byrne J. in an order made by consent were (briefly) whether certain classes of the club members were, during membership, and having regard to the terms of the defendants' title deeds, entitled as of right to use the garden or could be authorized by the defendants so to do.

The original grant to the defendants' predecessor in title purported to grant to the purchaser "his heirs, executors, administrators and assigns, and his or their lessees and sub-lessees or tenants (being occupiers for the time being) of the" premises in question the use of the garden or pleasure ground.

The argument before Buckley J. turned, according to the report, upon the question whether the members or particular categories of the members were "tenants" or mere licensees for the purposes of the deed, and the judge decided in favour of the latter view.

As Buckley J. observed at the beginning of the judgment, the freehold owner of the garden, that is of the alleged servient tenement, was never before the court at all. "The ornamental garden ground in question," he said,⁴² "belongs to the freeholder who is the common grantor of both the plaintiffs and defendants, but he is not a party to this action. The plaintiffs are asking for an injunction to restrain the defendants from going behind what the plaintiffs say is the grant which is made to them; and they are doing that in the absence of the common grantor who might have granted, so far as I see, rights to people other than those who are here before me. But I am not trying this action; and the question whether it is complete as to parties is not necessary for my determination, for this reason, that I am only proceeding under an order made by Byrne J. by which by consent it was ordered that certain points of law raised by the pleadings be set down to be argued." The whole of the rest

⁴¹ (1904) 73 L.J.Ch. 545; 20 T.L.R. 462; 90 L.T. 775.

⁴² 90 L.T. 775, 777.

of the judgment was devoted to consideration of the question whether the members were tenants or licensees.

It is no doubt true, as Mr. Goff contended, that if any right of the nature of a *jus spatii* is incapable of being an easement under our law, the questions submitted to and determined by Buckley J. were open to a simple and conclusive answer—or were, at best, questions of merely academic interest. On the other hand, as Mr. Cross observed, the questions had been formulated by another judge of the Chancery Division, Byrne J., under the Rules of the Supreme Court for the court to answer; and they had, moreover, been submitted in an action to which the owner of the “servient tenement” was not a party. The *International Tea Stores* case⁴³ had been before the Chancery Court in the immediately preceding year, and it seems at the least unlikely that Buckley J. (and all the experienced counsel before him) were wholly unaware of Farwell J.’s views. It appears more reasonable to us to assume that Buckley J. felt it his duty to determine the questions which had been properly submitted to him under the Rules without questioning the basis on which they had been or might have been formulated. In the circumstances, therefore, we cannot regard *Keith’s* case⁴⁴ as having authoritative force. On the other hand, we agree with Danckwerts J. in regarding *Duncan v. Louch*⁴⁵ as being a direct authority in the defendants’ favour. It has never, so far as we are aware, been since questioned, and we think it should, in the present case, be followed.

For the reasons which we have stated, Danckwerts J. came, in our judgment, to a right conclusion in this case and, accordingly, the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Robins, Hay & Waters for Burges, Salmon & Co., Bristol; Waterhouse & Co. for John Hodge & Co., Weston-super-Mare; Robbins, Olivey & Lake for Griggs & Collett, Weston-super-Mare.*

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⁴³ [1903] 2 Ch. 165.

⁴⁵ 6 Q.B. 904.

⁴⁴ 73 L.J.Ch. 545.

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[1954 H. 723.]

Evershed M.R.,
Birkett and
Romer L.JJ.

Nationality—Naturalization—Royal family—Naturalization of Princess Sophia and “all persons lineally descending from her”—Whether limited to persons born in the lifetime of Queen Anne—Effect of preamble on interpretation of statute—Statute of 1705 (4 & 5 Anne, c. 16)—British Nationality Act, 1948 (11 & 12 Geo. 6, c. 56), Sch. 4, Part II.

Statute—Construction—Preamble. Statute—Construction—Absurdity—Ex post facto.

A great-great-grandson of Ernest Augustus, Duke of Cumberland (a descendant of the Princess Sophia), who succeeded to the throne of Hanover in 1837, started an action against the Attorney-General for a declaration that he was a British subject, having regard to the provisions of the Statute of 1705 (4 & 5 Anne, c. 16, otherwise known as 4 Anne, c. 4).

The Statute, after reciting in the preamble that the Crown, on the death of Queen Anne without issue, was limited to the Princess Sophia and her issue, continued “to the end [that] the said “Princess . . . and the issue of her body, and all persons lineally “descending from her, may be encouraged to become acquainted “with the laws and constitutions of this realm, it is just and “highly reasonable, that they, in Your Majesty’s life time . . . “should be naturalized” and proceeded to enact that “the said “Princess . . . and the issue of her body, and all persons lineally “descending from her, born or hereafter to be born, be and shall “be . . . deemed . . . natural born subjects of this Kingdom,” papists excepted. Vaisey J. held that the enacting words must be read as limited to descendants of the princess born in the lifetime of Queen Anne:—

Held, (1) that as a matter of construction of the Act of 4 Anne, c. 4, there was nothing in the preamble to that Act and nothing therein, when interpreted in the light of the earlier relevant statutes of 7 Jac. 1, c. 2, and 4 Anne, c. 1, capable of controlling and limiting the plain and ordinary meaning of the material words of the enacting provisions and that the class of lineal descendants of the princess “born or hereafter to be born” meant the class of such descendants in all degrees and without any limit as to time.

The Sussex Peerage Case (1844) 11 Cl. & Fin. 85 and *Powell v. Kempton Park Racecourse Co. Ltd.* [1899] A.C. 143; 15 T.L.R. 266 considered.

(2) That there was nothing in the authorities which justified the restriction of plain and unambiguous language in a statute years after its passing on account of inconvenience or incongruity discovered ex post facto and, accordingly, that the plaintiff’s claim succeeded.

Yates v. The Queen (1885) 14 Q.B.D. 648; sub nom. *Regina v. Yates*, 1 T.L.R. 193 distinguished.

Decision of Vaisey J. [1955] Ch. 440; [1955] 1 All E.R. 746 reversed.

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APPEAL from Vaisey J.¹

The Statute 4 Anne, c. 4, of 1705 (in the Statutes of the Realm 4 & 5 Anne, c. 16), which was entitled “An Act for the naturalization of the most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body,” provided as follows: “‘WHEREAS the imperial Crown and dignity of the realms of England, France, and Ireland, and the dominions thereto belonging, after the demise and death of your Majesty, our most gracious Sovereign, without issue of your body, is limited by Act of Parliament, to the most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, granddaughter of the late King James the First, and the heirs of her body, being protestants: And whereas your Majesty, by your royal care and concern for the happiness of these kingdoms, reigns in the hearts and affections of all your people, to their great comfort and satisfaction, and will be a glorious example to your royal successors in future ages: And to the end the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, may be encouraged to become acquainted with the laws and constitutions of this realm, it is just and highly reasonable, that they, in your Majesty’s lifetime (whom God long preserve) should be naturalized, and be deemed, taken, and esteemed natural born subjects of England’: We your Majesty’s most dutiful and loyal subjects, the lords spiritual and temporal, and commons, in Parliament assembled, do most humbly beseech your Majesty that it may be enacted; and therefore be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present Parliament assembled, and by the authority of the same, that the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, be and shall be, to all intents and purposes whatsoever, deemed, taken, and esteemed natural born subjects of this kingdom, as if the said Princess, and the issue of her body, and all persons lineally descending from her, born or hereafter to be born, had been born within this realm of England; any

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“law, statute, matter, or thing whatsoever to the contrary notwithstanding.”

“II. Provided always, and be it further enacted and declared by the authority aforesaid, that every person and persons, who shall be naturalized by virtue of this Act of Parliament, and shall become a papist, or profess the popish religion, shall not enjoy any benefit or advantage of a natural born subject of England; but every such person shall be adjudged and taken as an alien, born out of the allegiance of the Queen of England, to all intents and purposes whatsoever; any thing herein contained to the contrary notwithstanding.”

The statute of 1705 was repealed by the British Nationality Act, 1948, which came into operation on January 1, 1949. That Act provided that every person who was a British subject immediately before that date should become a British citizen thereunder.

The plaintiff, Prince Ernest of Hanover (who was the great-great-grandson of Ernest Augustus, Duke of Cumberland, a son of George III, who, on the accession of Queen Victoria in 1837, succeeded to the throne of Hanover, as by the law of the Kingdom of Hanover succession was only in the male line), started this action against the Attorney-General for a declaration that, by virtue of the above statutes, he was a British subject.

Vaisey J. held that the plaintiff's claim failed.

The plaintiff appealed.

R. O. Wilberforce Q.C. (Kenneth Diplock Q.C. with him) and John Knox for the plaintiff, Prince Ernest of Hanover. If the Prince was a British subject immediately before the British Nationality Act, 1948, came into operation, he remained so thereafter by virtue of the transitional provisions. The sole question is, therefore, whether the Prince was a British subject by virtue of the Statute 4 Anne, c. 4.

By the Bill of Rights, 1688, the succession to the Crown was given to William and Mary and their issue, and, in default, to the Princess Anne, the younger sister of Queen Mary and the younger daughter of James II, and to her issue. By 1700 Queen Mary was dead, William was still on the throne but all Princess Anne's children had died, her son the Duke of Gloucester having died in 1700. The Act of Settlement of that year (12 & 13 Will. 3, c. 2) provided for the Hanoverian succession. The next in succession, in default of issue of Anne, was to be the Princess Sophia, Electress of Hanover, and the heirs of her body. But both the

Electress and her son, later George I, were then in Hanover and they did not come to the United Kingdom. There were fears of a Jacobite revival. In 1705 two Acts were passed, 4 Anne, c. 1 and c. 4 (in the Statutes of the Realm 4 & 5 Anne, c. 14 and 16), both designed to facilitate the succession on the death of Queen Anne of the Hanoverian line, having regard to the fact that the seven persons concerned at the time were all foreigners. The Statute 4 Anne, c. 1, was passed to permit the naturalization Bill to be introduced, notwithstanding that the conditions laid down in 7 Jac. 1, c. 2, might not have been complied with. By that Act no Bill for the naturalization of a person over the age of 18 could be exhibited unless the person concerned took the oaths of supremacy and allegiance and took the sacrament within one month of the introduction of the Bill.

By the Statute 4 Anne, c. 4, the lineal descendants of the Electress Sophia were to be deemed to be natural born British subjects. Prima facie the Prince is within the scope of that statute. He is lineally descended from the Princess Sophia through George III, and he is not within the disqualification laid down by section II. He was an alien enemy only whilst the state of war with Germany continued, and though he served in the German army he was conscripted into it. These considerations are not material, however, in seeking to construe the Act, for it must be construed in the light of the intention of Parliament when it was passed and not by reference to events happening some 250 years afterwards. On any view of the scope of the statute Frederick William of Prussia, who was alive when the Act was passed, must have been within it and he too fought against Britain.

It has been sought to restrain the enacting words of the statute by referring to the preamble. But if the operative words of an Act are clear and unambiguous, the sense cannot be restrained by a preamble. Here the words are as clear and precise as possible; they are all-embracing and universal words and are not at all indefinite or ambiguous (as, indeed, Vaisey J. held²). Parliament seems to have taken particular care to extend the scope as widely as possible. The words are not "heirs of "her body" as in the Act of Settlement, or "issue of her body" simpliciter as in the Statute 4 Anne, c. 1 (words which might be said to be limited in meaning), but "issue of her body . . . "lineally descending from her, born or hereafter to be born . . ."

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Plainly the scope was not restricted, as was the Statute of James I, to persons then over the age of 18 and, therefore, although it might be argued that in the Statute 4 Anne, c. 1, which was directed to overcoming the obstacles presented by the Act of James, "issue of her body" might be given a limited meaning having regard to the plain intention of that Act, there was no such reason for limiting the natural meaning of the words used in the Statute 4 Anne, c. 4; nor would a limited meaning be consistent with the words used in the statute. Those words are clearly wider than the comparable words in the Act of Settlement and in the Statute 4 Anne, c. 1. They extend to issue of every degree, without limit, and were clearly intended to include all members of the future royal family. The interpretation which it is sought to put on the Act involves reading words in, not merely placing a limitation on the words used. As the words in question are manifestly clear in meaning there is no need to look elsewhere to see whether they might possibly mean something else. A preamble can be called in aid where the operative words are indefinite or ambiguous (that is, fairly capable of more than one meaning): see Craies on Statute Law (1952) 5th ed., p. 189. But, as Lord Davey said in a dissenting judgment in *Powell v. Kempton Park Racecourse Co. Ltd.*,³ one must not create or imagine an ambiguity in order to bring in the aid of a preamble. The preamble is added after the operative words.

[*Sir Reginald Manningham-Buller Q.C., A.-G., intervening.* Not at the present time. The preamble to a private bill is certainly not added afterwards, and it is not usual to have a preamble at all with a public bill nowadays.]

Even if the preamble could be called in aid here, it does not clearly restrict the scope of the operative words. The preamble makes it clear that Parliament thought that it was advisable to take action in Her Majesty's lifetime, so that the descendants of the Princess Sophia, not only those born during Her Majesty's lifetime, should not be laid open to the taunt of being foreigners. If nothing else but "heirs of her body" had been used in the later Act, the earlier Act, 4 Anne, c. 1, might have had a limiting effect, but the Statute 4 Anne, c. 4, goes on to refer to lineal descendants; there is nothing contradicting that in the preamble. It does not introduce any limitation of the class of persons, or at any rate not so clear a limitation as would justify a court in cutting down the enacting words, even assuming that regard must

³ [1899] A.C. 143, 185; 15 T.L.R. 266.

be had to the preamble. It is even more difficult to restrain the meaning of the operative part of an Act by the title than by a preamble.

[*Sir Reginald Manningham-Buller A.-G.* The long title of a bill now confines the scope of a bill in the sense that amendments outside the scope of the title are not considered. It is a fundamental principle, as stated in Maxwell on the Interpretation of Statutes, 10th ed., pp. 1, 2, with reference to the *Sussex Peerage* case,⁴ that the construction put on an Act should carry into effect the intention of Parliament.]

The intention of Parliament is, of course, paramount, but the question is what means are legitimate to adopt in arriving at it. Vaisey J. rightly said that regard had to be had to the whole of the Act, but in actuality he went beyond that and took account of extraneous circumstances, including what happened years afterwards, which could not assist him in arriving at the intention of Parliament at the material time. The court is no doubt always impressed with an argument that a particular construction will result in inconvenience or absurdity, but it must have regard to the words used and to any necessary implication from them.

The cases on bankruptcy are not really of any great assistance here; *Brett v. Brett*⁵ was a plain case of interpreting an Act as a whole; it was not really a "preamble" case. In *Ryall v. Rolle*⁶ Lord Hardwicke L.C.,⁷ differing from Lord Cowper in *Copeman v. Gallant*,⁸ said that the enacting words could be restrained by the preamble. The point was not, however, necessary to the decision in that case.

[EVERSHED M.R. In a footnote Atkinson says that Lord Hardwicke L.C.⁹ was of the same opinion. In another case, *Mace v. Cadell*,¹⁰ it was held that the Act meant exactly what was said and that there was no case for restraining the scope to the case mentioned in the preamble.]

Inconvenience does not mean merely awkward, but something inconsistent with and contrary to the policy of the Act, as gathered both from the preamble and the enacting part of the Act. It is not disputed that in construing an Act one may take into account the convenience or absurdity of rival interpretations, but the fundamental question is what was the intention of Parliament in 1705 in passing the Act: see the *Sussex Peerage* case.¹¹ One

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⁴ ((1844) 11 Cl. & Fin. 85.⁵ (1826) 3 Add. 210.⁶ (1749) 1 Atk. 165.⁷ Ibid. 182.⁸ (1716) 1 P.Wms. 314.⁹ 1 Atk. 161, 165.¹⁰ (1774) 1 Cowp. 232.¹¹ 11 Cl. & Fin. 85.

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cannot argue backwards *ex post facto* because of an inconvenience arising 250 years later and use that as an argument in favour of a particular construction, unless it can be said that the sort of thing which has happened could not have been intended by Parliament at the time. If the situation which has arisen is something which Parliament could not have thought of at all, then that cannot enter into consideration. The question is, when looked at through the eyes of the Parliament of 1705, is it unreasonable to suppose that that Parliament did not intend that construction? It is submitted that the construction contended for by the plaintiff is not unreasonable because Parliament was legislating not merely for the immediate successor to the throne but for the potential Royal family. It was not legislating for a particular period of time. If it had been suggested to Parliament that the Act so construed might lead to difficulty in the future, it is submitted that Parliament might very well have taken the view that the Act could always be repealed if necessary, or another Act could be passed shutting the class, as was in fact done in 1948. The alternative would have been to specify a limited class which, bearing in mind the slow growth of the Royal family at that time, might very well have seemed to Parliament as being likely to fail, and then further legislation would have been needed. There is no overriding reason compelling the court to say that the submitted construction is so unreasonable that the court should depart from the *prima facie* intention of the statute.

It is not disputed that this statute may have been overlooked, but that has no bearing on the interpretation. Mere obsolescence or disuse does not affect the validity or construction of an Act. Nor is it possible to hold that an Act has no further effect because it is inappropriate to the times. It was not pleaded or proved that this Act had never had any practical operation; it was merely established that it had not previously come before the courts. Even in the case of the invocation of the trial by battle at the Warwick assizes Parliament had to intervene: see *Ashford v. Thornton*¹² and 59 Geo. 3, c. 46 (1819). There is not here any evidence of a practice which would assist the court to place something other than the *prima facie* interpretation on these words. [Reference was made to British Nationality Act, 1948, ss. 14 (2) and 19, and to Mervyn Jones' *British Nationality, Law and Practice*, p. 125.]

It is necessary to distinguish between the purpose of an Act and its scope. The fact that this Act was never dealt with in

¹² (1818) 1 B. & Ald. 405.

any Statute Law Revision Act is some indication that it has been regarded as still in force. It is not for the court, in construing an Act, to say that it is an inconvenient Act and accordingly no longer in force. The plaintiff's contention is that the enacting words of the Act are clear beyond doubt and that there is nothing in the preamble to restrain their meaning. The plaintiff is accordingly a British subject by virtue of 4 Anne, c. 4, and this appeal should be allowed.

Sir Reginald Manningham-Buller Q.C., A.-G. and B. J. H. Clauson for the Attorney-General. Vaisey J. was right in the conclusion which he reached, although he may have expressed views on matters which are not relevant to the decision. The only question is as to the construction of the Statute 4 Anne, c. 4. It is agreed that the statute cannot be construed in the light of events occurring many years after it was passed. However, so far as after events would have been reasonably foreseeable when it was passed, they can be taken into account in its construction. It is clear that the intention was to limit the statute's operation to descendants of the Princess born in Queen Anne's lifetime. It is necessary to have in mind the provisions of the earlier Acts, the Bill of Rights and the Act of Settlement. The succession to the throne had been settled before 1705. There was no doubt as to who would succeed to the throne, but, as the law stood, he would not be a British subject. That might cause difficulty. That difficulty was provided for by this Act. There was then no object in legislating for descendants of the princess born after the death of Queen Anne. The Act did not relieve all her descendants from complying with the provisions of 7 Jac. 1, c. 2. Parliament should not be presumed to have passed an Act wider in scope than was required to effect what was desired. It was unnecessary to make the Act operate after the Queen's death. The children of her successor would have been British subjects, since the children of the sovereign are British subjects wherever born. The reason why the words "all persons lineally descending from her" were added to the words "the issue of her body" was to exclude the possibility that grandchildren or great grandchildren should be held not to be "the issue of her body." The phrase "issue of her body" means children only, and "persons lineally descended from her" means issue of all degrees. The vital words are "in your Majesty's lifetime." The words cannot be transposed. The plaintiff, who was born in 1914, cannot fulfil the requirements of the Act. The Act 4 Anne, c. 4, must be read in conjunction with 4 Anne, c. 1. The first Act shows what

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was intended to be the scope of the second. If the preamble to the Act 4 Anne, c. 4, shows what was Parliament's intention, the question is whether that intention should be defeated by the enacting words.

The fundamental question is: what did Parliament intend when it passed this Act? The principle underlying the authorities is that the intention of Parliament is to be determined from construing the whole Act, including the preamble. If the preamble shows an intention to naturalize persons in the lifetime of the Queen, and the enacting words are wider, there is a conflict between the preamble and the enacting words. If absurdity or inconvenience results from giving effect to the wider enacting words, that is a good reason for cutting down the enacting words so as to give effect to the intention as expressed in the preamble. This case resembles *Brett v. Brett*.¹³

The authorities show that where one of two possible constructions of a statute results in absurdity and inconvenience that construction should not be adopted. Parliament cannot have intended to make all the descendants of the Princess British subjects. That would have brought them within the scope of the law of treason, with inconvenient results. The enacting words are not so clear that one cannot turn to the preamble to determine their meaning: *Powell v. Kempton Park Racecourse Co. Ltd.*¹⁴; *Caledonian Railway Co. v. North British Railway Co.*¹⁵ It is not contended that the preamble controls the Act: *Lumsden v. Inland Revenue Commissioners*.¹⁶ When the statute is looked at as a whole there is a conflict between the preamble and section 1. The circumstances in which the Act was passed require that the limited meaning in the preamble should be read into the enacting provisions. The court must endeavour to ascertain what was Parliament's intention when the Act was passed: *Sussex Peerage Case*¹⁷; *Yates v. The Queen*.¹⁸ [*Reg. v. Clarence*,¹⁹ and Craies on Statute Law, 5th ed., pp. 67, 130, 186, were also referred to.] In the eighteenth century more importance was attached to the preamble to a statute than in the nineteenth century.

The only reported case in which 4 Anne, c. 4, was considered appears to be *Charles Duke of Brunswick v. King of Hanover*,²⁰

¹³ 3 Add. 210.¹⁴ [1899] A.C. 143.¹⁵ (1881) 6 App.Cas. 114.¹⁶ [1914] A.C. 877; 30 T.L.R. 673.¹⁷ 11 Cl. & Fin. 85.¹⁸ (1885) 14 Q.B.D. 648; 1 T.L.R. 193.¹⁹ (1888) 22 Q.B.D. 23, 65; 5 T.L.R. 61.²⁰ (1843) 6 Beav. 1.

when the present point was not considered. The contention that a foreign sovereign cannot be a British subject is not accepted.

Effect should be given to the intention of Parliament, which cannot have been to confer British nationality on the descendants of the Princess for all time. It is no answer to say that Parliament could have rectified that inconvenience by passing another Act.

B. J. H. Clauson, following, referred to Mervyn Jones on British Nationality, Law and Practice, pp. 65, 66, 68.

R. O. Wilberforce Q.C. in reply. It does not appear how the Attorney-General arrives at the intention of Parliament in 1705, whether from a consideration of 4 Anne, c. 1, or from the general probabilities of the case or from an examination of the preamble. The key to 4 Anne, c. 1, lies in 7 Jac. 1, c. 2. That Act only applied to persons who were over 18 years of age. In the case of persons below that age there was no obstacle to naturalization: 4 Anne, c. 1, only deals with persons who were disqualified by the provisions of 7 Jac. 1, c. 2; 4 Anne, c. 4, deals with the issue of the body of the Princess. It is wider in scope than 4 Anne, c. 1. 4 Anne, c. 1, merely removed the obstacle of 7 Jac. 1, c. 2, to the passing of 4 Anne, c. 4.

When considering what was probably Parliament's intention in 1705 there is no reason to limit its intention to dealing with the immediate successors of Queen Anne. In construing the preamble it is not sufficient to find there some indication that the intention was to limit the scope of the Act to persons born in the lifetime of the Queen. That intention must be clear before the preamble can be used to cut down the words of the enacting provisions. The preamble is ambiguous. Where Parliament intended to limit the operation of a statute to limit a class of heirs, it did so in express terms: see the Precedent Act of 1711. None of the authorities cited by the Attorney-General derogate from the *Kempton Park* case.²¹ The cases which he cited can be divided into two classes. First, *Yates v. The Queen*²²; *The Queen v. Clarence*²³ and *Lumsden v. Inland Revenue Commissioners*,²⁴ in which the effect of the preamble to the statute in question was not considered. While we do not object to the doctrine that the inconvenience resulting from one construction of a statute is a factor to be considered, it is submitted that that doctrine must be applied with caution. Secondly, there is

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²¹ [1899] A.C. 143.²² 14 Q.B.D. 648.²³ 22 Q.B.D. 23.²⁴ [1914] A.C. 877.

C. A. *Caledonian Railway Co. v. North British Railway Co.*,²⁵ where the preamble of the statute was considered. It was there held that the enacting words were capable of alternative meanings. The plaintiff relies on the *Kempton Park* case²⁶ and submits that the preamble cannot be used to cut down the enacting provisions of 4 Anne, c. 4, and that this appeal, accordingly, should be allowed.

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Nov. 16. The following judgments were read.

EVERSHED M.R. The Statute 4 Anne, c. 4, which this appeal requires us to construe, is short and should be set out in extenso. [His Lordship read the statute, and continued:] That Act was (among others) repealed by the British Nationality Act, 1948; but the repeal was subject to the provision that every person who was a British subject immediately before the repealing Act came into operation should become a British citizen thereunder.

The plaintiff claims that he is by virtue of the Statute of Anne and the Act of 1948 a British citizen. It is not in doubt that he is in fact a lineal descendant of the Electress Sophia. It is also admitted on the part of the Attorney-General that, if he is otherwise entitled to succeed, he is not disqualified by the terms of the proviso to the Statute of Anne. He was born in the year 1914 and the question in the action is whether, upon its true interpretation, the Act of 1705 is such as to apply to a person coming into existence more than 200 years after the date of its passing.

By the standards of the great majority of the Acts of Parliament which now fall to be considered by the courts, the Act 4 Anne, c. 4, is old and, by the same standards, its form and language are archaic. There are now, as we were informed, some 400 living persons who claim lineal descent from the Electress Sophia of Hanover named in the Act. In the two and a half centuries which separate the year 1955 from the year 1705 the structure of that which we call western civilization has suffered many profound changes. The nations of 1955, the populations which they embrace and the obligations which they demand from their inhabitants, were no doubt in many respects undreamt of in the philosophy of 1705. Moreover, the nation, with which the domains of the Electors of Hanover were absorbed,

²⁵ 6 App.Cas. 114.

²⁶ [1899] A.C. 143.

has twice in the present century been at war with the United Kingdom, so that the plaintiff, like his father before him, has found himself arrayed in arms against the sovereign to whom he has since his birth (if his claim is well founded) owed the allegiance of a British subject.

The Attorney-General has, however, not relied upon any defence to the plaintiff's claim based on the facts to which I have last referred, or upon the circumstance that, at the date of the coming into operation of the Act of 1948, he was, as an enemy, disabled from having any access to the Queen's courts for the purpose of asserting that he was then a British subject. The Attorney-General also expressly disclaimed before us any argument to the effect that the Statute of Anne ought now, having regard to its antiquity and archaic form, to be so construed as to "whittle down" or minimize the effect which would otherwise flow from its terms.

The question, then, for our decision is one of the meaning which, according to the relevant rules for the interpretation of statutes, should now be given (and which would have been given in the year 1705) to the language which I have already recited. To the problem so simply posed the answer would *prima facie* appear undoubtedly to be in favour of the plaintiff; for the enacting language of the Statute—"all persons lineally descending from" (the Princess Sophia) born or hereafter to be born" *ex facie* covers clearly the case of a person admittedly so descended and not otherwise disqualified.

But it is the contention of the Attorney-General that the question as I have posed (and answered) it is an over-simplification of the problem; that the true scope and intention of Parliament, discerned from a consideration of certain earlier Statutes *in pari materia* with the Statute 4 Anne, c. 4, and also (more especially) of the preamble of the Statute of Anne itself, require that the apparently wide signification of the general language used in the enactment should be substantially restricted; and that the right construction of the material words, which I have just quoted from the Act, is such as to limit the class of descendants, conformably with the Parliamentary intention expressed in the preamble, to those descendants born in the lifetime of Queen Anne. The Attorney-General has additionally argued that general words in an enactment will be restricted in order to avoid what would otherwise be an absurd or highly inconvenient result: and the result which would, in the present case, make the Statute of Anne comprehend an ever-increasing

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class of persons, from one generation to another, in course of time almost impossible of identification, would (it is contended) be not only highly inconvenient and absurd, but would exceed any object which the Act could sensibly have been designed to achieve.

We were referred to numerous authorities illustrative of the principle to be applied in construing statutes. It has, I think, to be conceded that the numerous judicial pronouncements in the books upon the significance of a preamble in interpreting the enacting provisions of a statute disclose at least some variation in emphasis.

I take by way of example two citations from the decision in the House of Lords in *Powell v. Kempton Park Racecourse Co. Ltd.*,¹ where the question (decided affirmatively by a majority of the House) was whether the apparently general words of the Betting Act, 1853, should be limited, in light particularly of the Parliamentary intention as expressed in the preamble, so as to exclude the Act from applying to betting with bookmakers upon the Kempton Park racecourse. Lord James of Hereford, who was of the majority, said² that he fully accepted the dictum of Lord Tenterden in *Halton v. Cove*,³ which included the following sentence: "Yet on a sound construction of every Act of Parliament, I take it the words in the enacting part must be confined to that which is the plain object and general intention of the legislature in passing the Act, and that the preamble affords a good clue to discover what that object was."

It will be noticed that the language of Lord Tenterden does not (at any rate in terms) appear to require the presence of any ambiguity in the enacting part of the Statute before its ordinary meaning can in such a case be limited. On the other hand, Lord Davey, who dissented from the majority opinion, seems plainly to indicate that words in the enacting part which are themselves clear cannot be restricted so as to accord with the apparent promise of the preamble. He said⁴: "Undoubtedly"—I quote from Chitty L.J.'s judgment words "with which I cordially agree—"it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms." But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are

¹ [1899] A.C. 143; 15 T.L.R. 266.² [1899] A.C. 143, 193.³ (1830) 1 B. & Ald. 538, 558.⁴ [1899] A.C. 143, 185.

“fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital.”

I do not think it necessary to attempt, for my own part, any fresh formulation of the rule proper to be applied. I will assume (as I think Mr. Wilberforce was himself content to assume) that if the scope and purpose of an Act is made plain by reference to other relevant statutes and other admissible matters of context, or by reference to its preamble, or both, then words *prima facie* of general import in the enacting provisions may be cut down so as to make the Act in its effect correspond with its purpose.

As is stated in the first sentence of Maxwell on the Interpretation of Statutes, 10th ed., pp. 1, 2, with a reference to the *Sussex Peerage Case*,⁵ “ . . . the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded ‘according to the intent of them that made it.’ ” The difficulty in cases of this kind is that although a preamble may, in Lord Tenterden’s words, provide a “good clue” to what is to follow, Parliament must at least be assumed also to intend what it expressly enacts.

I turn, first, to the other relevant statutes to which we were referred and which provide the context or background for the Statute 4 Anne, c. 4. The accession to the throne of the Prince and Princess of Orange as King William III and Queen Mary II was followed by the passing in 1688 (1 Will. & Mar. sess. 2, c. 2) of “An Act declaring the rights and liberties of the subject and settling the succession of the Crown,” later known by its short title of “The Bill of Rights.” By this Act, after reciting that “the late King James II by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the protestant religion and the laws and liberties of this kingdom,” it was provided that the “Crown and Regal Government” should be and continue to “Their said Majesties, [King William and Queen Mary,] and the survivor of them during their lives and the life of the survivor . . . and that after their deceases the said Crown and premises shall be and remain to the heirs of the body of Her Majesty (Queen Mary), and for default of such issue to Her Royal Highness the Princess Anne of Denmark and the heirs of her body, and for default of such issue to the heirs of the body of his said Majesty.” The first section also contained

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⁵ (1844) 11 Cl. & Fin. 85, 143.

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a provision excluding altogether from the succession every person who should be reconciled to or hold communion with the See or Church of Rome or should profess the popish religion or marry a papist.

The death of Queen Mary without issue, and the death, also, of Prince William, Duke of Gloucester, the only surviving issue of Princess Anne of Denmark, called for further provision for the settlement of the Crown after the death of the survivor of King William and Princess Anne. There was accordingly passed in the year 1700 (12 & 13 Will. 3, c. 2) "An Act for the further limitation of the Crown and better securing the rights and liberties of the subject," now commonly known as "The Act of Settlement." Section 1 of this Act provided that the Princess Sophia, Electress and Duchess Dowager of Hanover, and the heirs of her body being Protestants should succeed to the Crown after the King and Princess Anne and in default of issue of either of them.

At the date of the passing of this Act there were living three sons of the Electress Sophia and also three grandchildren. All of them were, however, living, and had always lived, out of England.

It will be seen, as the Attorney-General observed, that sufficient provision had been made for the settlement of the Crown after the deaths of King William and Princess Anne. But, assuming, as no doubt seemed virtually certain, that the Princess Anne would not leave issue, the person to succeed, according to the Hanoverian succession of the Crown, would be or would be likely to be a stranger to these shores and subject, therefore, to the taunt of being a foreigner.

In the course of opening the appeal, Mr. Wilberforce stated that, at the time of the passing of the Act which we have to construe, lively fears were entertained of an attempted restoration on the part of the Jacobite party. The Attorney-General was not prepared so to concede: but however that may be, it is, to my mind, plain enough that the object of the Act 4 Anne, c. 4, was to provide in advance against the alien taunt and also, no doubt, as the preamble to the Act states in terms, to encourage the family of the Electress Sophia to a better acquaintance with our "laws and constitutions."

In this situation Parliament proceeded accordingly to make provision for the naturalization as English subjects of those persons among whom would be found the successor to the throne upon the death, without issue, of Princess Anne.

But there was upon the Statute Book an Act of King James I (7 Jac. 1, c. 2), which prevented the exhibition of a bill for the naturalization of any person of the age of 18 years or over, unless that person had previously complied with certain conditions as to taking the sacrament and also taking the oaths of supremacy and allegiance. It was obvious that some modification of the Act of James was necessary. No doubt the required modification might have taken the form of a partial repeal of that Act in the proposed Act of naturalization itself. In fact, Parliament proceeded by two steps of which the first, being the prelude to the Act of 4 Anne, c. 4, was an Act, chapter 1 in the same session, entitled "An Act for exhibiting a Bill in this present Parliament for naturalizing the most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover and the issue of her body." As this Act is also short, and was much relied upon by the Attorney-General, it should also be set out at length:

"WHEREAS the most Excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, are to be naturalized, and by reason of their being beyond the seas, they cannot qualify themselves in order thereto, according to the Act made in the seventh year of the reign of King James the First, which requires every person to receive the Sacrament of the Lord's Supper, within one month before any Bill for naturalization be exhibited, and also take the oaths of supremacy and allegiance in the Parliament House, before his or her Bill be twice read: be it enacted . . . that a bill for the naturalization of the said most excellent Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, shall and may be exhibited and brought into this present Parliament, and twice read; any law, statute, matter, or thing whatsoever to the contrary notwithstanding."

The Attorney-General has fastened upon the words in the preamble: ". . . and by reason of their being beyond the seas, they" (that is, the Electress and the heirs of her body) "cannot qualify, etc." The presence of these words, he argues, is the clue to the scope and intention of the Act, and shows that the general words, "the heirs of her body," in the title of the Act and in its enacting part, must be restricted to those "heirs" then living; and thence he proceeds to the conclusion that the general words in the later Act, chapter 4, which constituted the fulfilment of the promise in chapter 1, must likewise be restricted; for otherwise, the later Act would extend to an

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area greater than the ground prepared for it and would, to the extent of the excess, be at variance with the Statute of James I.

To this argument, however, the terms of the last-mentioned Act themselves provide, in my judgment, a formidable objection. The conditions thereby imposed on naturalization applied in fact (as reference to the Act shows) only to persons of the age of 18 years or over. It was not and could not be suggested as a matter of construction that the effect of the Statute 4 Anne, c. 1, was therefore limited to the heirs of the body of the Electress who were then 18 years old or more. If such had been the intention, it is inconceivable that the reference to the age of 18 years in the Statute of James would have been omitted in its recital in the Statute of Anne. [Though the matter of fact was not precisely gone into, one of her grandchildren was then under the age of 18.] If this is right, it appears clearly to follow that the preamble in this case is not a clue for a limited interpretation of the enactment. In other words, if the class of persons whose later naturalization was forecast is not, on any view, to be limited to those specifically affected by the Statute of James, then there seems no compelling reason against giving to the words "the heirs of her body" their natural effect; treating the preamble as no more than a reference to the justification of the Statute—for the reason that some of the class of persons intended to be naturalized were or might be affected by the conditions of the earlier Statute.

There is, to my mind, a further and by no means negligible objection to the Attorney-General's argument. If his view of the limited scope of the Statute 4 Anne, c. 1, be accepted, still, on his own argument, the scope of the second Statute, chapter 4, extends further; for it covers not only the issue of the Electress living at the time but all further issue thereafter to be born in the lifetime of Queen Anne, a period that might have extended for 30 or 40 years. To that not unsubstantial extent, therefore, the Statute would present an apparent inconsistency with the Statute of James. I add, also, upon this objection (though I am somewhat anticipating my view of the question of absurdity) that the argument for limiting the category of persons to be naturalized loses, to my mind, much of its attractiveness to common sense when the class ceases to be limited to the known and certain number of the living, and becomes one liable to increase during an uncertain and perhaps prolonged period of time.

I have therefore come to the conclusion that reference to the historical context of the relevant Act and to the earlier statutes does not discover or require a restriction of its scope—nor, indeed, provide any clue to the intention of Parliament as expressed in the Act itself. Nor do I think that these earlier statutes can materially influence the important question to which I must now come, of the effect upon the enacting provisions of the Act of the terms of the preamble, and particularly of the words therein, “in your Majesty’s life time.”

It was the plaintiff’s case that these words meant no more than “now”; and merely served to indicate that, in the view of Parliament in 1705, provision should then be made (i.e., in Queen Anne’s lifetime) for the naturalization of the Electress and her descendants.

On the other side it was said that, had such been the purpose of the words, they would have appeared earlier in the recital—which would have read “It is just and reasonable in Your Majesty’s life time that they,” etc. By their position, in fact, the words must (as the Attorney-General argues) be related grammatically to the words “should be naturalized”; and that since no person could be naturalized in the lifetime of the Queen unless he or she was then in existence, the import of the words was inevitably to restrict the purpose of the Act, as stated by its preamble, to the naturalization of those members of the class of the lineal descendants of the Electress who should come into being before Queen Anne’s death.

For myself, I should feel no hesitation in preferring, as a matter of grammar, the construction suggested by the Attorney-General, if the matter rested as I have stated it; but it does not so rest. The preamble, after the words “be naturalized,” continues “and be deemed, taken, and esteemed natural-born subjects of England.” If grammatically the words “in your Majesty’s life time” are properly related to the words “be naturalized,” they should no less, in my judgment, be related to the words which immediately follow, “and be deemed,” etc. It is here that, to my mind, the difficulty arises. For whatever else may be said of the scope and meaning of the Act, it is quite certain that its intention cannot have been to limit the effect of the “naturalization” of the persons designated to the period of Queen Anne’s life—a result which would quite plainly have defeated its whole object. Notwithstanding, therefore, its grammatical inelegance (as I think), it seems to me

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impossible to assert that Mr. Wilberforce's construction is not a possibly legitimate interpretation of the effect of the vital words.

I have felt myself accordingly compelled, in spite of my strong first impression of the natural sense and import of the vital words "in your Majesty's life time," to agree with Vaisey J. that the preamble points, at best with an uncertain finger, to the scope and intent of the Act. I further agree with him that the essential words in the enacting part, descriptive of the class of persons affected, are upon their face clear and unambiguous.

Though the class is in the title of the Act referred to (as it had been described in the earlier Statute of the same session) as "the issue of her body" (a general formula capable, at any rate, of being limited to issue in one degree only), the description was expanded in the last sentence of the preamble to "the issue of her body and all persons lineally descending from her" (a formula clearly not capable of such limitation). In the enacting provision the description is (not once only but twice) carried a further stage in emphasis by the addition of the significant words "born or hereafter to be born." The necessary extension of the class to issue of every degree, without limit, is further reinforced in my judgment (if such reinforcement be necessary) by the reference to "future ages" in the preamble itself.

Agreeing, therefore, with the judge upon both essential premises, I am compelled by the rules for the interpretation of statutes to which I have earlier referred, to a different conclusion from that at which he arrived. For, as Mr. Wilberforce contended, the present is, upon these premises, the converse of the case in which words of merely general import can be controlled by a preamble clearly pointing to a specifically restricted Parliamentary intention. For reasons which I have given, the words of the preamble necessarily and exclusively relied upon by the Attorney-General admit, at least, of doubt. On the other hand, the vital language of the enacting provision is not only, upon the face of it, unambiguous but, as I think, cannot be fairly described as that of a merely general formula. On the contrary, it appears to me to be as precise and emphatic as any form of words could be which was apt to describe a class of persons not presently ascertainable.

I conclude, therefore, that, as a matter of construction of the Act 4 Anne, c. 4, there is nothing in the preamble—and, as I have already said, nothing in the preamble interpreted in the light of the earlier relevant statutes—capable of controlling and limiting the plain and ordinary meaning of the material words

in the enacting provision. In other words, the class of lineal descendants of the Electress "born or hereafter to be born," designated in the enacting provision, means the class of such descendants in all degrees and without any limit as to time. I add that such an interpretation, together with a similarly unlimited interpretation of the earlier Act 4 Anne, c. 1, not only avoids any conflict in scope between the two Acts but also disposes of any resultant inconsistency between their effect and the continuing provisions of the Statute of James I.

I am disposed to think that, if the matter had rested solely upon the construction of the Act 4 Anne, c. 4, Vaisey J. would have been of the same opinion. But I think that the judge's mind was, in some degree, influenced by consideration of the antiquity of the statute and by the fact that for a great number of years the rights, which it purported (on this view) to confer, do not appear ever to have been asserted. "As usage," said the judge, "is a good interpreter of law, so non-usage lays an antiquated Act open to any construction weakening or even nullifying its effect."⁶

What I might call the "dead letter" argument is undoubtedly attractive; but I have already observed that the Attorney-General expressly disclaimed, before us, any reliance upon it. Vaisey J. was also, as I think, considerably impressed by the second of the arguments presented by the Attorney-General, to which I must now turn, namely, that founded upon inconvenience and absurdity.

"I think," said the judge,⁷ "that if the generality of the enacting clause . . . is not restrained, it would lead to a conclusion which would certainly be inconvenient and also, I think, absurd, seeing that an appreciable part of the inhabitants of Europe would be invested without their consent and for the most part without their knowledge with British citizenship."

Though I venture to think, if I may say so, that the description of the class of persons now constituting the lineal descendants of the Electress Sophia as "an appreciable part of the inhabitants of Europe" may be something of an overstatement, it is undoubtedly true that a strict ascertainment of all the persons who could now claim the privilege which the Act purported to confer would be an inconvenient matter—particularly having regard to the disqualification imposed by the proviso. Equally it appears, at the least, to be incongruous that persons who are nationals of a country that has twice been engaged in the bitterest

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⁶ [1955] Ch. 440, 446.⁷ Ibid. 450.

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conflict with this country in the present century should claim to be, and to have been since birth, citizens of the United Kingdom. But this inconvenience and this incongruity seem to me rather to arise from the effect of the passage of a long period of time upon an Act that was allowed to remain unrepealed than from the effect of the Act itself when it came into operation.

As Mr. Wilberforce observed, it was always open to Parliament to prevent or restrict the inconvenience and the absurdity by the repeal of the Act—as in fact it did in the year 1948. I think, in other words, that the force of the argument ab inconvenienti becomes, upon analysis, but an oblique restatement of the “dead letter” argument which the Attorney-General has disclaimed.

The examples which Vaisey J. derived from Professor Goodhart indicate at least that the notion of conferring citizenship upon a particular individual and his descendants in all degrees is not so absurd as to have found no parallel in other countries. And if, as the Attorney-General’s argument must concede, the conferment of citizenship upon a class of descendants liable to increase during a substantial period of time is not open to challenge on the grounds of inconvenience or absurdity, it seems to me illogical to contend that an indefinite prolongation of the period necessarily renders such a provision ineffective on those grounds. True it is, no doubt, that the object to be achieved could with reasonable certainty have been assured without an indefinite prolongation of the period. But it appeared during the argument that, without indulging in extravagant hypotheses, the succession might have devolved upon an alien, if the terms of the Statute were limited so as to comprehend only descendants of the Electress born in the Queen’s lifetime.

In support of this part of his case, the Attorney-General cited to us three decisions: *Reg. v. Bateman*,⁸ *Yates v. The Queen*,⁹ and *Reg. v. Clarence*.¹⁰ In my judgment the present case falls far short of the principle which those cases illustrate.

Of the three cases, neither the first nor the third is, in my judgment, authoritative upon the present question. *Yates v. The Queen*,¹¹ however, which was a decision of this court, is much more in point. The question there decided was that the general term, *prima facie* unequivocal, “criminal prosecutions,” was not to be construed in the Newspaper Libel and Registration Act,

⁸ (1857) 27 L.J.M.C. 95.¹⁰ (1888) 22 Q.B.D. 23; 5 T.L.R.⁹ (1885) 14 Q.B.D. 648; 1 T.L.R. 61.

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¹¹ 14 Q.B.D. 648.

1881, as including prosecutions by way of criminal information. By the terms of the Act, the institution of a "criminal prosecution" of the character comprehended by the Act required the fiat of the Director of Public Prosecutions. If therefore, criminal informations were covered by the Act, it would follow that the Director of Public Prosecutions would be brought into competition with, if he was not enabled to override, the Attorney-General and even the Queen's Bench Division itself. Such a result would, in the words of Brett M.R., involve "an indecent absurdity," for the avoidance of which the court felt able so to restrict the meaning of "criminal prosecutions" as to exclude criminal informations.

It is to be observed that the absurdity in *Yates v. The Queen*¹¹ became manifest immediately upon the coming into operation of the Act. The general words "criminal prosecutions," if effective according to their ordinary meaning, gave rise necessarily and at once to the conflict.

Cotton L.J. used this language in the course of his judgment¹²: "If one sees that by applying the language to some thing which is not within the mischief contemplated by the Act, it will produce manifest absurdity or inconvenience, then according to the rule of construction which is well known, and for which it is unnecessary to refer to any authority, it is the duty of the court so to construe the general term as not to apply it to that which will have such a result."

The Lord Justice was clearly not contemplating some inconvenience or absurdity which a prophet might forecast as capable of arising in 200 years' time. I read this language as meaning clearly that the inconvenience or absurdity is one which must necessarily and immediately arise from the fact of the Act extending to some subject-matter apparently within the broad scope of the generic terms used, though not within the mischief contemplated by Parliament.

It is in this essential respect that, in my judgment, the present case differs from *Yates'* case¹³; for, if the general words in the Statute of Anne be given the wide significance which prima facie they bear, no absurdity or inconvenience thereby became manifest upon the Act coming into operation. No anomaly, no conflict of interest or authority, no difficulty of application arose or could arise upon the Act taking effect. The inconvenience or absurdity (if there be such) arose only from the impact of a long

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¹¹ 14 Q.B.D. 648.¹³ 14 Q.B.D. 648.¹² Ibid. 660.

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course of events upon a statute permitted to remain upon the Statute Book for more than two centuries.

In my judgment, nothing in any of the cited cases justifies the restriction of plain and unambiguous language in a statute, years after its passing, on account of inconvenience or incongruity discovered *ex post facto*. It is, in truth, to my mind no more than the "dead letter" argument once again in another guise.

In my judgment, accordingly, the argument of the Attorney-General upon this head cannot be sustained; nor does it get any greater vigour by being added to the arguments with which I have already dealt based on the earlier legislation or on the preamble to the Statute.

I have come, accordingly, to the conclusion that the plaintiff was entitled to the declaration which he sought, and that his appeal ought to be allowed.

BIRKETT L.J. I have come to the same conclusion. I think that the plaintiff was entitled to the declaration which he sought before Vaisey J. and that by reason of the Statute of Anne of 1705, chapter 4, which has already been read in full by the Master of the Rolls, and by the provisions of the British Nationality Act, 1948, the plaintiff's claim to be a British subject succeeds, and this appeal must accordingly be allowed.

It might be thought that the question to be answered in this appeal could be stated quite simply, although it is notoriously difficult sometimes to answer a simple question. When all is said and done, the question is: Do the provisions of chapter 4 of the Statute of Anne of 1705 apply to the plaintiff? But immediately further questions of some complexity arise, which have already been the subject of acute controversy and of judicial pronouncement.

What *are* the provisions of the Statute? How are the words of the Statute to be interpreted? Undoubtedly intended to naturalize somebody, were they ever intended by the Parliament of 1705 to naturalize a person in the position of the plaintiff in this action? Can the plaintiff, born some two hundred years after the passing of the Act, claim to be a British subject by reason of its provisions in the year 1955, two and a half centuries after its appearance on the Statute Book? Were the words of the Statute intended to naturalize only those descendants of the Electress Sophia living in the lifetime of Queen Anne? Does not any other conclusion lead to absurd results, which Parliament could never have intended or even contemplated? Must not

the enacting words of the Statute be modified by other statutes affecting the position of the Electress Sophia and her descendants, and do not certain words in the preamble to the Statute limit the application of the enacting words?

These are some of the questions raised in this appeal from the judgment of Vaisey J. The judge was clearly troubled by the antiquity of the Act of 1705 and by the attempt to apply its provisions to the plaintiff in the year 1955.

Two passages from his judgment may perhaps be cited on this point, for they show the way in which the judge approached the problem before him. The first passage reads¹⁴: "Now it is, "of course, plain that a statute is not impliedly repealed merely "by becoming obsolete, or by mere non-user, however long the "time may have been since it was known to have been actually "put into force. See *per* Dr. Lushington in *The India* (No. 2).¹⁵ "But this principle must, in my judgment, be applied with due "regard to the circumstances of the case, and although the word "'obsolete' cannot in strictness be applied to any Act of Parlia- "ment remaining on the Statute Book, there are undoubtedly "statutes still to be found there which would seem only to have "been permitted to remain there because their existence has "been overlooked." The second passage reads¹⁶: "Many "examples of statutes effete or forgotten, though remaining on "the Statute Book, are to be found in the textbooks; for instance, "trial by battle was still in force in 1819, and drawing and "quartering was still part of the sentence of treason until 1870. "And, as usage is a good interpreter of law, so non-usage lays "an antiquated Act open to any construction weakening or even "nullifying its effect. Such considerations as these cannot be "excluded in connexion with the Act of Anne."

The claim of the plaintiff, if valid, rested on the legal effect to be given to the words of a statute, passed some two and a half centuries ago, when Parliament was concerned to naturalize those persons who might succeed to the throne on the death of the Princess Anne without issue, a state of affairs which then seemed virtually certain, the position of the King as a widower, who would not remarry, appearing to be taken for granted. When the Act of 1705 was passed there were seven persons then living who were affected by its provisions: the Electress Sophia herself; her son George, afterwards George I, who was then 45 years old; his two brothers, one aged 39 and the other 31; and

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¹⁴ [1955] Ch. 440, 446.¹⁶ [1955] Ch. 440, 446.¹⁵ (1864) 33 L.J.P. 193.

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three grandchildren, one George Augustus, afterwards George II, then 22 years of age; Sophia Dorothea, aged 20; and Frederick William, aged 17.

The Act of 1705 was not repealed until the passing of the British Nationality Act of 1948, and then it was provided that all those who were British subjects immediately before the passing of the Act of 1948 should continue to be so. In my opinion, the historical setting of the Act of 1705 is extremely important when considering what effect must be given to the actual words of the Statute. It has been described in the judgment of the Master of the Rolls and need not be repeated in detail. But in the 12 years that had passed since the Bill of Rights in 1688 had sought to settle the succession of the Crown, the situation had again become precarious, because of the death of Queen Mary without issue, and the death of the only son of Princess Anne of Denmark. In 1700, therefore, in the Act of Settlement, Parliament further provided for the succession by enacting that the Electress Sophia and the heirs of her body, being protestants, should succeed after the death of William and Princess Anne without issue.

But now that the succession had been provided for in that particular way, it became necessary to cater for the situation that would arise if a foreigner were to succeed to the throne. The Statutes 4 Anne chapter 1 and chapter 4, therefore, concerned the question of naturalization. The Statute of James I, which laid down certain conditions which had to be complied with before a Bill could be presented to Parliament, was dealt with by chapter 1 of the Statute, and chapter 4 is the Statute with which this appeal is immediately concerned.

The argument of the Attorney-General based on chapter 1 of the Statute of 1705 does not seem to have been considered by Vaisey J. at all. That argument was that the words in the preamble to the Act—"Whereas the most excellent Princess "Sophia, Electress and Duchess Dowager of Hanover, and the "issue of her body, are to be naturalized, and by reason of their "being beyond the seas, they cannot qualify themselves in order "thereto, according to the Act . . . of James I," etc.—must be read as meaning that only those persons who were then living were intended to be naturalized, and the plaintiff is therefore excluded, because chapter 4 must be similarly confined to persons then living.

The Master of the Rolls has pointed out that the conditions laid down in the Statute of James I only applied to persons of the age of 18 and upwards, and could have no application, for

example, to Frederick William, who was the son of a deceased daughter of the Electress Sophia and was born in 1688, and in 1705, therefore, was only 17 years of age.

It seems to me plain that chapter 1 of the Act of 1705 lends no support to the view that the persons it was intended to naturalize were to be confined to persons then living, as the Attorney-General contended; and chapter 1 of the Statute of 1705 was intended merely to overcome the manifest difficulties created by the Statute of James I, which affected some, but not all, of the persons intended to be naturalized by the later enactment, chapter 4.

The Attorney-General placed great reliance on the wording of the preamble to chapter 4 of the Act of 1705: "And to the end the said Princess Sophia, Electress and Duchess Dowager of Hanover, and the issue of her body, and all persons lineally descending from her, may be encouraged to become acquainted with the laws and constitutions of this realm, it is just and highly reasonable, that they, in your Majesty's lifetime (whom God long preserve) should be naturalized, and be deemed, taken, and esteemed natural born subjects of England." He said that these words, particularly the words "in your Majesty's lifetime," had the effect of restricting the meaning of the words in the enacting words of the Statute to persons living in the lifetime of Queen Anne.

I cannot agree with this view. The enacting words of the Statute are, in my opinion, perfectly plain and unambiguous. They do not need to be modified or explained by the preamble, for, in my view, the preamble is merely saying that what it is intended should be done, as set out in the enacting words, should be done in Her Majesty's lifetime.

Vaisey J. came to the conclusion¹⁷ that the enacting words "though unqualified and plain in their meaning, when standing alone, are nevertheless of such a character and produce inevitably such consequences that the legislature must have intended to put some limit on their operation." "When once this conclusion is reached," he continued, "the question arises: what limit? And then one turns to the preamble and one finds (though only, I agree, by implication) that the purpose of the enactment was a purpose to be effected not indefinitely at some future time or times, but in the lifetime of Queen Anne herself, and in consequence I think the plaintiff is not entitled to the relief which he seeks."

¹⁷ [1955] Ch. 440, 451.

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It is agreed that the cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of the Parliament that passed them. The language of the enacting words is clear and the judge found it to be so by his use of the words "unqualified and plain in their meaning." In these circumstances I should have thought that, according to the rules for the construction of statutes, the preamble ought to be disregarded. But it was the consequence of giving the words their plain meaning which made the judge turn to the preamble, because he said that the legislature must have intended to put some limit on their operation.

With great respect, I cannot think that this was applying the recognized rules of construction, for, if the meaning of the words is plain, the consequences are to be disregarded. In the *Sussex Peerage* case,¹⁸ Tindal C.J., giving the considered advice of the judges to the House of Lords, said: "My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Dyer C.J., . . . is 'A key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'"

Vaisey J. said that the words of the Statute were such that the legislature must have intended to put some limit on their operation.

In *Salomon v. A. Salomon & Co. Ltd.*¹⁹ Lord Watson said: "'Intention of the legislature' is a common but very slippery phrase, which, properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

¹⁸ 11 Cl. & Fin. 85, 143.

¹⁹ [1897] A.C. 22, 38.

The consequences of applying the plain meaning of the words may produce results in 1955 that are strange and may possibly be inconvenient. In his book entitled *For Lawyers and Others*, published in 1936, the late Theobald Mathew concluded his chapter on "Royalty and the Law" by quoting the very section of the Act of 1705 with which this appeal is concerned, and asking the question "How many people are aware that the "German ex-Emperor is a British subject?" He does not appear to have been troubled by any doubts as to the interpretation or effect of the Act, but was concerned to exhibit one of its curious consequences.

It would be a little strange if, after the passage of two and a half centuries, some curious situations did not arise when applying a statute of such age to a state of affairs in 1955; but in my opinion nothing has arisen to cast doubt upon the intention of Parliament in 1705. It has never been disputed that the plaintiff is a lineal descendant of the Electress Sophia, and that he is in no way disqualified by reason of section 2 of the Act; and in my opinion he plainly comes within the enacting words of the Statute, and at the passing of the British Nationality Act of 1948 he was a British subject and is, therefore, entitled to the declaration for which he asked in the court below and for which he asks here. I would allow the appeal.

ROMER L.J. It appears to me that it is of fundamental importance to bear in mind that the proper construction to place upon the Act of 1705 is precisely the same now as that which would have been attributed to it by a court of construction immediately after it passed into law. The function of the court is to ascertain the intention of Parliament from the language in which that intention was expressed. Due regard must, of course, be had to all relevant circumstances which existed at the time when the Act was passed; but it is no more permissible, in my judgment, in construing a statute than it is in construing a deed, a will or any other written instrument, to arrive at a conclusion as to the meaning of the language used in the light of events which happened afterwards. Foreseeability of probable results may be attributed to the author of any document having regard to circumstances which existed when it was executed, and which were known, or presumably known, to him at the time; but the fact that those results did subsequently occur cannot be accepted as relevant to the interpretation of the language used.

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I have ventured to emphasize this point, for, if the construction of the Act for which the plaintiff contends is the right one, it would follow that the German Kaiser Wilhelm II was a British subject and that there are some 400 persons scattered about Europe now who are entitled to British nationality by virtue of this Statute; and it is a little tempting, perhaps, to assume that a construction which leads to such results cannot be the right one. As I have already intimated, however, if the language of the Act requires a certain construction to be placed upon it, that construction can in no way be affected by consequences such as those to which I have referred. The question whether such consequences could reasonably have been foreseen by the legislature in 1705 and the bearing which such question should have upon the construction of the Act are matters relevant to the alleged absurdity of the enacting clause, if read literally, which I consider hereafter.

I will not reread the Statute, which has already been stated in full in the judgment which the Master of the Rolls has delivered. It is enough to say that the enacting part of the Act brings within its scope, as clearly and plainly as any language could convey, all protestants, either then already born or who might be born at any time thereafter, who could show that they were lineally descended from the Princess Sophia.

Why, then, should effect not be given to this clear expression of parliamentary intention? The answer which the Attorney-General has given to the question may be summarized in brief as follows: The enacting part of the Statute, if taken by itself, would not only go beyond the purpose which Parliament presumably had in mind, but would lead to an absurdity which the legislature cannot have intended; that this not only justifies but compels the court to seek the true intention from material other than the enacting clause itself; that such material is afforded by the preamble, which shows with clarity what Parliament really intended to do; and that, accordingly, the enacting clause should be controlled by the preamble and made to conform to the intention which is therein disclosed.

It appears to me that the Attorney-General's case, as thus formulated, is open to more than one serious objection. The first objection (and it is a formidable one) which stands in his way is to be found in the general proposition that, if the enacting words of the Statute are clear and unambiguous, they cannot be restricted by the preamble. This proposition is supported by high authority and was expounded with precision in some of the

speeches which were delivered in *Powell v. Kempton Park Race-course Co. Ltd.*²⁰ "Two propositions," said Lord Halsbury L.C.,²¹ "are quite clear—one that a preamble may afford useful "light as to what a statute intends to reach, and another that, "if an enactment is itself clear and unambiguous, no preamble "can qualify or cut down the enactment." Lord Davey said²²: "Undoubtedly '—I quote from Chitty L.J.'s judgment words "with which I cordially agree—'it is a settled rule that the "preamble cannot be made use of to control the enactments "themselves where they are expressed in clear and unambiguous "terms.' "

The Attorney-General suggested that the views so expressed are inconsistent with opinions which had earlier been pronounced in the House in *Caledonian Railway Co. v. North British Railway Co.*²³ In my judgment, this criticism is not well founded, for it appears to me that the views which were expressed in that case do no more than support the proposition, which appears in Craies on Statute Law, 5th ed., p. 189, namely, that, if the language of an enactment is not clear, resort may be had to the preamble.

It must, however, be conceded that it is not altogether easy to reconcile the principle as enunciated by Lord Halsbury L.C. and Lord Davey in *Powell's* case²⁴ with other judicial observations of great authority and weight (cf., e.g., Lord James of Hereford's speech²⁵ in the same case); nor does it appear to be in accord with such decisions as that of Sir John Nicholl in *Brett v. Brett*.²⁶

In these circumstances, although I believe the general principle to be as I have already stated it, I hesitate to say that it is so rigid and of such universal application as to destroy the argument of the Attorney-General, which I have summarized, in limine; and I proceed, therefore, to consider the other reasons why, in my opinion, the argument cannot be accepted.

First, as to the purpose which Parliament had in mind, current surrounding circumstances may, as I have already said, legitimately be taken into account; but, subject thereto, the purpose can only be ascertained from the language of the Act itself. The only extraneous circumstance, which was suggested as having any direct bearing on the matter, was the preliminary Statute 4 Anne, c. 1. The Master of the Rolls has already

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²⁰ [1899] A.C. 143.²¹ Ibid. 157.²² Ibid. 185.²³ (1881) 6 App.Cas. 114.²⁴ [1899] A.C. 143.²⁵ Ibid. 189.²⁶ (1826) 3 Addams 210.

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considered this Act in his judgment, which I have had the advantage of reading. I respectfully agree with what he has said with regard to it, and I only desire to say for myself that as, on any view, the legislature departed in the second Act from the very limited scope which was envisaged by the recital in the first, the only question, as it seems to me, is as to the extent of such departure. I therefore find no assistance, in construing the second Act, from the language of the first.

As regards the suggested absurdity of the enactment clause if taken by itself, it appears to me to be a dangerous doctrine that the courts, when confronted by plain and unambiguous legislative language, should reject it as absurd. It is true that its power so to do is supported by authority. (See *Yates v. The Queen*²⁷; see also *per* Sir Thomas Parker L.C.B. and Lord Hardwicke L.C. in *Ryall v. Rolle*,²⁸ and *per* Lord Coleridge C.J. in *Reg. v. Clarence*.²⁹) I cannot but think, however, that if such power in fact be vested in the courts, it should only be exercised in cases that imperatively demand its application; for, apart from the fact that its exercise comes perilously close to legislating, that which seems absurd to one mind may not appear so to another—as was pointed out by Lord Greene M.R. in *Grundt v. Great Boulder Proprietary Gold Mines Ltd.*³⁰

In any event, however, I see nothing necessarily or inherently absurd in the conception that Parliament was intending to provide in 1705 that all those upon whom the British Crown might subsequently devolve by virtue of the Act of Settlement should become British citizens at birth; and Parliament was presumably alive to the fact that, if the class of persons affected by the Act should become eventually too large, it could be closed by subsequent legislation. It appears to me that a far greater degree of absurdity than that which has been suggested in this case is required to justify the court in departing from clear enacting language, assuming that absurdity does, in itself, afford ground for any such departure.

The next consideration which arises is as to the real meaning of the relevant recital in the preamble, and whether it demonstrates beyond any reasonable doubt an intention which is inconsistent with the enacting clause; for the Attorney-General rightly conceded that the preamble cannot be resorted to for the purpose of controlling the enactment itself unless a definite and

²⁷ 14 Q.B.D. 648.²⁸ (1749) 1 Atk. 165, 174, 182.²⁹ (1888) 22 Q.B.D. 23, 65.³⁰ [1948] Ch. 145, 159; [1948] 1 All E.R. 21.

unambiguous expression of intention can be collected from its terms.

In my opinion, such cannot be said of the recital upon which reliance is placed. It seems to me that the words "in your Majesty's life time," may have been introduced into the preamble for either of two quite different purposes. The object of their introduction may have been to ensure that only those descendants of the Princess Sophia, who were already born or should subsequently be born in the lifetime of Queen Anne, should come into the operation of the Act. On the other hand, the purpose of the words may have been intended merely to point to the occasion of the Act. I cannot but think, for myself, that if the first of these two purposes was the real one, the draftsman of the Act would have taken the obvious course of inserting after "and all persons lineally descending from her" the words "and born in your Majesty's lifetime." Had this been done, the recital would, as Vaisey J. pointed out, have demonstrated an unmistakable intention to confine the naturalization of Princess Sophia's issue within the limits for which the Attorney-General is now contending; and the fact that this very apparent method of conveying this intention was not adopted raises a considerable doubt in my mind, to put it at its lowest, whether any such intention was present at all.

The matter, however, by no means rests there. If one thing is clear beyond question it is that, whatever the class might be who were to be affected by the Act, the naturalization which was to be thereby conferred was not to be contemporaneous only with Queen Anne's lifetime, but was to continue operative after her death; and yet, on the recital as it stands, if the words "in your Majesty's life time" limit the period for conferment of naturalization, so also they limit its duration. In order, therefore, to impute to the recital the effect for which the respondent contends, it would in any case be necessary to introduce such words as "for ever after" between "and" and "be deemed." I am by no means prepared either to supply, or to transpose, words in the recital merely in order to derive an intention which can then be said to be clearly inconsistent with the enacting part of the Act.

Upon the language of the recital itself there is much to be said, in my opinion, for the view that it was introduced for the second of the purposes to which I have earlier referred; and therefore the fact that there may also be much to be said in favour of the first of these purposes can be of no sufficient avail

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C. A. to the respondent upon this point; for ambiguity in the recital is fatal to him.

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For the reasons which I have stated, I am unable to attribute to this Act the construction and effect which commended itself to the judge, and I agree with my brethren that the appeal should be allowed.

Appeal allowed.

Leave to appeal to the House of Lords.

Solicitors: *Farrer & Co.; Treasury Solicitor.*

B. A. B.

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May 12.

INLAND REVENUE COMMISSIONERS v. KENMARE.

Danckwerts J.

Revenue—Income tax—Settlement—Revocability—Residence of settlor out of the jurisdiction—Property within the jurisdiction—Income from settlement included in settlor's assessment for surtax—Power from time to time to determine part of trusts—Equivalent to a power to revoke—Settlor out of the jurisdiction included—Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 38 (2).

A settlement of a value of some £700,000 made in 1947 by a settlor at all material times resident out of the jurisdiction of property situated in the jurisdiction contained in clause 5 thereof the following provision: "(a) Notwithstanding the trusts here-
"inbefore declared the trustees if they in their absolute discretion
"think fit may at any time and from time to time during the life
"time of the settlor . . . declare that any part of the trust fund
"[not exceeding in any one period of three consecutive years the
"sum of £60,000] . . . shall thenceforth be held in trust for the
"settlor absolutely and thereupon the trusts hereinbefore declared
"concerning the part of the trust fund . . . to which such declara-
"tion relates shall forthwith determine and the trustees shall
"thereupon transfer such part of the trust fund . . . to which
"such declaration relates to the settlor absolutely. . . ."

The settlor was assessed to surtax under section 38 (2) of the Finance Act, 1938, in respect of her income under the settlement. The assessment was discharged by the Special Commissioners on the ground that section 38 had no application to a person resident outside the jurisdiction, and they did not in the circumstances consider whether the settlement contained a power of revocation.

The Crown appealed from that decision:—

Held, (1) that the power in clause 5 to determine from time to time a part of the trust was, notwithstanding the limitation imposed on its exercise, a power of revocation within the meaning of section 38 (2).

(2) That since the settlement was comprised of property situate in the United Kingdom it came within the inherent jurisdiction of Parliament as expressed in the Income Tax Acts, and that there was nothing in the Act to limit the operation of the perfectly general words in section 38 (2) "any income arising under the "settlement" in respect of the settlement of such property so as to exclude the income of a settlor who was at all material times resident out of the jurisdiction.

Perry v. Astor (1935) 19 T.C. 255; 51 T.L.R. 325 and *Sirdar Gurdial Singh v. Rajah of Faridkote* [1894] A.C. 670; 10 T.L.R. 621 distinguished.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The question on this appeal arose in connexion with an assessment to surtax made on Enid, Countess of Kenmare, which, so far as is material, depended on the assessment as her income of certain income arising from investments in the United Kingdom under a settlement made by her dated September 24, 1947.

Lady Kenmare was not in any material year resident or ordinarily resident in the United Kingdom. She had three children, all of whom had attained the age of 21 years, and for the benefit of whom she had been desirous of making a settlement. Investments (referred to in the schedule to the settlement) to the value of some £700,000 were settled by her on trust for investment.

The settlement contained a provision that the trustees should "in their absolute discretion pay the income" (or part thereof in their absolute discretion) "of the scheduled investments and "of the property for the time being representing the same (hereinafter called 'the trust fund') to the settlor during her life." The trustees were to hold all such income as should not be paid to the settlor on income account and were in their absolute discretion to pay the whole or any part of such balance from time to time to the settlor during her life, provided always that any such balance was to be added to the trust fund and to devolve accordingly. After the death of the settlor the trustees were to stand possessed of the capital and the income of the trust fund on the usual trusts for the benefit of children and issue of a settlor. Clause 5, which was the material clause, provided: "(a) Notwithstanding the trusts hereinbefore declared the "trustees if they in their absolute discretion think fit may at "any time and from time to time during the lifetime of the "settlor by writing under their hands declare that any part of "the trust fund not exceeding the amount hereinafter mentioned

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“ shall thenceforth be held in trust for the settlor absolutely, and
 “ thereupon the trusts hereinbefore declared concerning the part
 “ of the trust fund or the property to which such declaration
 “ relates shall forthwith determine and the trustees shall there-
 “ upon transfer such part of the trust fund or the property to
 “ which such declaration relates to the settlor absolutely provided
 “ always that the foregoing power shall not be exercisable by the
 “ trustees so as to vest in the settlor in any period of three
 “ years the first of which shall commence on the date hereof and
 “ end on the same date in the year 1950 the second of which
 “ shall end on the same date in the year 1953 and so on in every
 “ third year a part or parts of the trust fund or property of a
 “ value or aggregate value exceeding £60,000 of the currency
 “ of the Islands of Bermuda. (b) If in any such period of three
 “ years the foregoing power shall not be exercised to the full
 “ extent of the said sum of £60,000 the deficiency may be carried
 “ forward so as to increase the amount in respect of which the
 “ said power may be exercised in any succeeding period of three
 “ years.” There was then a provision as to the manner in which
 the value should be fixed.

Lady Kenmare was assessed to surtax in respect of the income
 of the settlement under section 38 (2) of the Finance Act, 1938.¹

¹ Finance Act, 1938, s. 38: “. . .
 “ (2) If and so long as the terms of
 “ any settlement are such that—(a)
 “ any person has or may have power,
 “ whether immediately or in the
 “ future, and whether with or with-
 “ out the consent of any other person,
 “ to revoke or otherwise determine
 “ the settlement or any provision
 “ thereof; and (b) in the event of the
 “ exercise of the power, the settlor or
 “ the wife or husband of the settlor
 “ will or may become beneficially
 “ entitled to the whole or any part of
 “ the property then comprised in the
 “ settlement or of the income arising
 “ from the whole or any part of the
 “ property so comprised; any income
 “ arising under the settlement from
 “ the property comprised in the settle-
 “ ment in any year of assessment or
 “ from a corresponding part of that
 “ property, or a corresponding part
 “ of any such income, as the case
 “ may be, shall be treated as the
 “ income of the settlor for that year
 “ and not as the income of any other

“ person: Provided that, where any
 “ such power as aforesaid cannot be
 “ exercised within six years from the
 “ time when any particular property
 “ first becomes comprised in the
 “ settlement, this subsection shall not
 “ apply to income arising under the
 “ settlement from that property, or
 “ from property representing that
 “ property, so long as the power
 “ cannot be exercised. . . . (7) The
 “ foregoing provisions of this section
 “ shall apply for the purposes of
 “ assessment to income tax for the
 “ year 1937-38 and subsequent years
 “ and shall apply in relation to any
 “ settlement, wherever made and
 “ whether made before or after the
 “ passing of this Act: . . .”

S. 41: “. . . (4) For the purposes
 “ of this Part of this Act—(a) the
 “ expression ‘income arising under a
 “ ‘settlement’ includes—(i) any in-
 “ come chargeable to income tax by
 “ deduction or otherwise, and any in-
 “ come which would have been so
 “ chargeable if it had been received

The Special Commissioners discharged the assessment and held that Lady Kenmare being outside the jurisdiction at the material time was not liable to be assessed to surtax in respect of income from the settlement. Their reasons are referred to in the judgment. In the circumstances they did not consider the question whether the settlement was revocable within the meaning of section 38 (2).

The Crown appealed from that decision.

At the request of both parties the court was asked to determine also whether the settlement was revocable.

Geoffrey Cross Q.C., Sir Reginald Hills and E. Blanshard Stamp for the Crown. Assuming that the settlement falls within the provisions of section 38 (2) of the Finance Act, 1938, there is no limitation in the Act which precludes its application to a person out of the jurisdiction in respect of property in this country.

Section 41 (4) and Schedule III must also be considered. The effect of section 41 (4) (a) (i) is to exclude income from a settlement arising from a foreign source, but would include income arising under a settlement from a source in the United Kingdom. When section 38 is read together with *Perry v. Astor*,² it may be thought that the legislature had in mind this question of extra-territoriality when the section was drafted. In this case trust funds in this country produced income which was paid under a settlement made in Bermuda to the settlor who, for tax purposes, was resident in Bermuda, and the question is whether that income is income arising under a settlement within the meaning of section 38 (2). There is nothing which requires the settlement to be made in the United Kingdom, and the position here is not affected by the fact that this was a foreign settlement with foreign trustees: see section 38 (7). That is quite consonant with the general Income Tax Acts.

"in the United Kingdom by a person
"domiciled, resident and ordinarily
"resident in the United Kingdom . . .
"but, where the settlor is not domiciled,
"or not resident, or not ordinarily
"resident, in the United Kingdom in
"any year of assessment, does not
"include income arising under the
"settlement in that year in respect
"of which the settlor, if he were
"actually entitled thereto, would not
"be chargeable to income tax by
"deduction or otherwise by reason

"of his not being so domiciled, resident,
"or ordinarily resident; . . ."

Sch. III: "Part I. Adjustments
"between the Settlor and Trustees.

"1. Where by virtue of any provision
"of section 38 of this Act any income
"tax becomes chargeable on and is
"paid by a settlor, he shall be entitled—
"(a) to recover from any trustee,
"or other person to whom income
"arises under the settlement, the
"amount of the tax so paid; . . ."

² (1935) 19 T.C. 255; 51 T.L.R. 325.

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The commissioners decided that because Lady Kenmare was not resident in the United Kingdom at the relevant time, section 38 (2) did not apply, but on the plain meaning of the section it should apply to such settlements.

A second argument on behalf of the settlor was based on Schedule III, by which it was suggested that it was a condition precedent to the operation of the section that the settlor should always be able to enforce the right of recovering the tax paid, but if the power of revocation is given to the trustees the settlor might not be able to enforce it out of the jurisdiction.

[DANCKWERTS J. How do you recover surtax if the settlor is not resident in the jurisdiction?]

There has been great difficulty at times where a person has no agent here; it may not always be recoverable. But that does not affect the Crown's case. *Perry v. Astor*,³ read in its proper context, assists the Crown rather than the settlor, since it was never disputed in that case that income of persons resident here and from property here should be subject to the tax laws of this country: see also *Colquhoun v. Brooks*.⁴ The limitation in the former case on the general words "any income" was necessary for the proper construction of section 20 of the Finance Act, 1922, but would not be authority for the construction of different words in section 38 (2) of the Act of 1938.

Clause 5 (a) of the settlement clearly contains a power of revocation within the meaning of section 38 (2). It is exercisable by the trustees over the whole of the settlement. The power does not need to be exercisable by the settlor himself, as the section says "if any person has . . ." The power of revocation in the section is not a power of revocation in an absolutely strict sense; the property need not come back to the settlor, though in fact in this case it does revert to the settlor. The power may be either an immediate or future power to determine the settlement or any provision of it; in the present case the whole of the property may go back to the settlor within an ascertainable period. [Reference was made to *Inland Revenue Commissioners v. Wolfson*.⁵]

F. Heyworth Talbot Q.C., F. N. Bucher and H. H. Monroe for Lady Kenmare. The question is whether the settlor has a power by which she may revoke or determine the settlement. The word "revoke" is not used in clause 5 (a), and on the

³ 19 T.C. 255.

⁵ (1949) 65 T.L.R. 260; [1949] 1

⁴ (1889) 14 App.Cas. 493; 5 T.L.R. 728; 2 T.C. 490.

All E.R. 865; [1949] W.N. 190; 31 T.C. 141.

natural meaning of the words it would be supposed that the clause does not contain a power of revocation. Section 38 (2) provides "otherwise determine the settlement or any provision thereof," but there is no power here to determine the settlement or any provision of it; this is only a fiduciary power exercisable within the framework of the settlement, which results in the substitution of a different trust under the settlement, which always continues.

Although the settlor may become beneficially entitled to part of the property as a result of the exercise of the power in clause 5 (a) as provided in paragraph (b) of section 38 (2), the words of paragraph (b) are to be construed separately and they cannot be imported into paragraph (a) so as to show that the settlement contained a power of revocation.

Parliament has no jurisdiction to tax a non-resident in respect of income which is not his income. This income is only payable to the settlor at the discretion of the trustees, and it is the income of the trustees who are also out of the jurisdiction. In those circumstances section 38 (2) must be construed with that limitation: see *Perry v. Astor*⁶ and *Sirdar Gurdyal Singh v. Rajah of Faridkote*.⁷ When this legislation was framed by the legislature, it was not thinking of taxing non-resident settlors, and quite rightly, as Parliament has no jurisdiction so to do. It is not contended that a person not resident in this country cannot be liable for surtax on his own income, but this is not a case of a person being assessed on his own income. The problem was solved in *Perry v. Astor*⁸ by putting a limitation on the words "any income": see judgment of Lord Macmillan⁹ in that case. One cannot generalize and say that it means the particular type of settlement in that case.

Cross Q.C. in reply. On the question of extraterritoriality, Parliament has unlimited power to legislate on any matter which it chooses; that is the difference between this country and a country which has a written constitution: *Norman v. Golder*,¹⁰ per Lord Greene.¹¹

DANCKWERTS J., having referred to the material provisions of the settlement, continued: The result of the provision in clause 5 is, therefore, that the trustees might declare in writing that the trusts relating to a portion of the trust fund should

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⁶ 19 T.C. 255.¹⁰ (1944) 26 T.C. 293; [1945] 1 All⁷ [1894] A.C. 670; 10 T.L.R. 621.

E.R. 352.

⁸ 19 T.C. 255.¹¹ 26 T.C. 299.⁹ Ibid. 290.

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determine, and the portion of the trust fund relating to that declaration would thereupon be held on trust for the settlor absolutely. By reason of the limitation the maximum amount which could be released in that way in each period of three years is £60,000, but any part which was not fully released in one period of three years would be available to be released in the subsequent period. It was pointed out by Mr. Cross that if the trust funds were diminished in value it might be possible for the fund to be wholly freed from the trusts within a foreseeable time, an event which, I should imagine, is rather unlikely having regard to the size of the fund; and similarly, that it might be possible, if Lady Kenmare lived for a considerable time, for the whole of the fund to be released in this way during her life—again, I should have thought, rather an improbable event.

There is a provision in clause 13 of the settlement that the settlement was to be construed and take effect in accordance with the law in the Islands of Bermuda, and that the courts of those islands should be the forum for the administration thereof. There was a peculiar provision under which the trustees might make declarations changing the law which would be applicable to the settlement. I do not think that I need trouble with that rather surprising provision.

A claim against the respondent is made by virtue of section 38 (2) of the Finance Act, 1938. [His Lordship read sections 38 (2), 41 (4) of, and paragraph 1 (a) of Part I of Schedule III to, the Finance Act, 1938, and continued:] Section 41 contains certain definitions which are of material importance, and reference must also be made to the provisions of Schedule III because they were relied on by Mr. Heyworth Talbot on behalf of Lady Kenmare. There are certain other provisions which I need not go through in detail, including a provision for the handing over of relief which the settlor might get in certain events; and in Part III, paragraph 1, there is a provision that tax chargeable at the standard rate shall be charged under Case VI of Schedule D. Mr. Heyworth Talbot says that that cannot possibly be workable in the case of a person who is not a resident in the United Kingdom, and that provision must therefore be nugatory if it is intended to apply to non-residents in this case; Mr. Heyworth Talbot also argued that paragraph 4 of Part III was impossible to carry out in the case of non-residents; it was as follows: "The "General or Special Commissioners may by notice in writing "require any person, being a party to a settlement, to furnish "them (within such time as they may direct, not being less than

"28 days) with such particulars as they think necessary for the purposes of any of the provisions of Part IV of this Act, and if that person without reasonable excuse fails to comply with the notice he shall be liable to a penalty not exceeding fifty pounds and, after judgment has been given for that penalty, to a further penalty of the like amount for every day during which the failure continues." Penalties cannot, of course, be enforced against persons who are not here and, therefore, one cannot, so far as that provision is concerned, necessarily obtain the particulars required from persons who are non-resident.

The Special Commissioners, who decided in favour of Lady Kenmare, held as follows: "... that on a proper construction of section 38 (2), Finance Act, 1938, read in its context in Part IV of that Act, the respondent, being outside the jurisdiction of the United Kingdom legislature during the material time was not liable to be assessed to surtax in respect of income from the Bermudan Trust Fund, which did not arise to her and to which she had only such title as, in their absolute discretion, the trustees might see fit to allow her. We were assisted in the opinion to which we came by a consideration of the case of *Perry v. Astor*,¹ in particular the speech of Lord Macmillan.² ... Having regard to the conclusion to which we came on this contention of the respondent we did not find it necessary to come to any decision on the respondent's third contention that the Bermudan settlement was not revocable. ... We, accordingly, allowed the appeal and left figures to be agreed. Subsequently, it being reported to us that figures had been agreed following our decision in principle, on March 9, 1954, we reduced the said assessment for 1947/48 to the sum of £23,063"—that is, from £47,190.

It will be observed that the Special Commissioners did not decide the material question whether or not the settlement was revocable. Counsel on both sides have asked me, if possible, to decide that matter, and not to remit the question to the Special Commissioners if I should be in favour of the Crown on the other point which has been discussed in this case. I propose to adopt that course, and it will be convenient to consider first of all the question whether the settlement is revocable, which seems to be a less complicated point than the other matter and one which really depends on the interpretation of the settlement and of section 38 (2).

¹ (1935) 19 T.C. 255; 51 T.L.R.

² 19 T.C. 283-291.

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It was argued by Mr. Heyworth Talbot on behalf of Lady Kenmare that there was no power to revoke the settlement or any provision thereof, and he sought in aid the reference in paragraph (b) of subsection (2) dealing with beneficial interests in any part of the property as showing that the references to partial revocation were in a different context and not to be imported into paragraph (a) (which is really the material provision which I have to apply), because there is no appropriate context. It is plain that in the event of the trust being determined in this settlement the person who benefits is the settlor (Lady Kenmare), who becomes absolutely entitled to the property in respect of which the trustees exercise their power of release. What the trustees can in fact do under the provisions of clause 5 is not expressed, it is true, by using the word "revoke." What they can do is, they may "by writing under their hands declare that "any part of the trust fund not exceeding the amount herein-after mentioned shall thenceforth be held in trust for the "settlor absolutely"; and the clause proceeds: "and thereupon "the trusts hereinbefore declared concerning the part of the "trust fund or the property to which such declaration relates "shall forthwith determine and the trustees shall thereupon "transfer such part of the trust fund or the property to which "such declaration relates to the settlor absolutely." Mr. Heyworth Talbot argues that that is not a provision which determines the settlement or any provision of the settlement, because it merely substitutes one trust for another, and the settlement continues: it is an exercise of the power within the framework of the settlement. That argument at first sight appears to have some attraction, but it is not a correct way of looking at the matter. In the first place, I am satisfied that although the word "revocation" is not expressly used, the effect of the provision in clause 5 (a) is a revocation of the trust; and it seems to me that if there is a revocation of the trust, whether it is subject to a limitation or not, there is a revocation or determination of either the settlement or some provision thereof. It seems to me that there is clearly a determination of the provisions settling the property in trust for other persons in respect of the trust fund so far as the trustees have by their declaration in writing power to deal with the trust fund at any particular time, and this is a power which might in the end, therefore, possibly be exercised in regard to the whole trust fund. Therefore, so far as that point is concerned, the

settlement is clearly one which is revocable within the provisions of section 38 (2) of the Finance Act, 1938.

The other point is more formidable. First of all, Mr. Heyworth Talbot said that the levying of tax on a settlor who is non-resident, in respect of income which is not his income from property in the United Kingdom, but is the income of the trustees, who are also non-resident, and operating under a settlement not governed by the law of England (or any part of the United Kingdom for that matter), is beyond the recognized taxing power of the legislature of this country. He referred to *Sirdar Gurdyal Singh v. Rajah of Faridkote*,³ where the Privy Council were considering an appeal in which, as I understand the result, they decided that the Rajah of Faridkote and his courts had exceeded their jurisdiction in dealing with the property of somebody who was resident outside the particular sovereign State, and the passage on which Mr. Heyworth Talbot relied is in the judgment of the court which was delivered by the Earl of Selborne⁴: "As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates." He also relied on *Perry v. Astor*,⁵ and contended that, as a result of the observation of Lord Macmillan,⁶ who made the principal speech in that case, in the same way the powers to tax of the Imperial Parliament in the United Kingdom were subject to a limitation of the kind for which he contended. So far as the *Sirdar* case⁷ in the Privy Council is concerned, I will merely observe that there the Privy Council was considering the legislation or decisions of a foreign State. Here I am attempting to consider the legislation of the country of which this court is a court, and I have to consider the legislation of a Parliament which within the United Kingdom is not subject to any limitations of any kind whatever. There is no theory of unconstitutionality such as may be found in countries which have a written constitution. The power of Parliament is, at any rate as to property in this country, supreme. It seems to me, therefore, that the same considerations do not apply, at any rate so long as I am dealing with either property within the country or persons

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³ [1894] A.C. 670; 10 T.L.R. 621.⁶ Ibid. 289-291.⁴ [1894] A.C. 684.⁷ [1894] A.C. 670.⁵ 19 T.C. 255.

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who are resident within the jurisdiction, and I do not think that Lord Macmillan's statement involved any other proposition. The matter was pointed out quite plainly by Lord Russell in his dissenting speech in *Perry v. Astor*⁸ on the point, on which he treats the majority of the House of Lords as being of the same opinion, because he says⁹: "There must, of course, be the "necessary limitation which is inherent in all our income tax "legislation, namely, that what is taxed under or by virtue of "this provision can only be either (1) income which is here, or "(2) income of a person resident here." It is true that the case before me is not dealing with the income of a person resident here, but the income arises from property in this country. It seems to me, therefore, to fall within one of the recognized limits mentioned by Lord Russell and also referred to by the House of Lords in *Colquhoun v. Brooks*.¹⁰

The real basis on which Lord Macmillan reached the result which he did in *Perry v. Astor*¹¹ was that he found that the apparently general words in the particular section, which was in one sense a predecessor of the present one (that is to say, section 20 of the Finance Act, 1922), required some limitation to be put on those general words. The words were "any income," and he held that the words "any income," by reason of the strange results which would otherwise follow, must be regarded as subject to some limitation which he could formulate. He said¹²: "If "the words 'any income' are construed, as they reasonably "may be, to mean any income chargeable with tax under the "British Finance Act of the year, the difficulties of the Crown's "interpretation to a large extent disappear." It was, therefore, as Mr. Cross contended, simply a matter of construction of the words in section 20 of the Finance Act, 1922, and a question of construction on which Lord Russell differed from the majority of the Lords.

That case was decided in 1935. I have to consider section 38 of the Finance Act, 1938, a section which was probably recast in view of the decision of the House of Lords in *Perry v. Astor*,¹³ and I have to consider a section which has different words. Mr. Heyworth Talbot has very plainly and correctly pointed out that the provisions of the section may produce what might be injustices, because Schedule III, which attempts to enable a

⁸ 19 T.C. 255.

⁹ Ibid. 280.

¹⁰ (1889) 14 App.Cas. 493; 5 T.L.R. 728; 2 T.C. 490.

¹¹ 19 T.C. 255.

¹² Ibid. 290.

¹³ 19 T.C. 255.

settlor to recoup himself for tax which he has paid, will possibly not be enforceable against the trustees under a settlement regulated by the law and by the courts—and construed by the courts and enforced by the courts—of some other country. But the question is whether the result of those contentions and submissions is such that I can find some limitation which must be put on the perfectly general words in section 38 (2) “any settlement” and “any income arising under the settlement.”

In regard to that I must refer to subsection (7) of section 38. [His Lordship read section 38 (7) of the Finance Act, 1938, and continued:] The words “any settlement, wherever made . . .” in that subsection are to be observed. That certainly seems to indicate some extension to settlements made in other countries, like the one in the present case.

When I come to section 41 (4) I find that the expression “income arising under a settlement” is defined in a way which leads me to the conclusion that the section was intended by the legislature to include income which might be payable to non-residents; and if that is the result, I must construe the provisions on the footing that the income of non-residents must be included in the provisions of the statute.

There are provisions in section 41 (4) which seem to be intended to limit the provisions to property within this country, though it includes the taxing of non-residents.

I am unable to find, and Mr. Heyworth Talbot was really unable to suggest, what limits I could put upon the provisions of section 38 (2) which would be consistent with section 41 and would operate in the way in which Lord Macmillan found himself able to deal with the matter in *Perry v. Astor*.¹⁴ I am unable, therefore, to limit the words in the way in which it was contended on behalf of Lady Kenmare and which satisfied the Special Commissioners, and I must come to the conclusion that the terms of this settlement and the position of the settlor fall within the provisions of section 38 (2) of the Finance Act, 1938, and, accordingly, the appeal must be allowed.

Appeal allowed; case remitted to the Special Commissioners to adjust the assessment in accordance with the judgment.

Solicitors: Solicitor of Inland Revenue; Theodore Goddard & Co.

I. G. R. M.

¹⁴ 19 T.C. 255.

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ALLIED INVESTORS' TRUSTS LTD. v. BOARD OF
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[1955 A. 2525.]

Company—“Unit trust scheme”—Approval of Board of Trade—Board's refusal to approve scheme as “authorized unit trust scheme”—Compliance with statutory requirements—Scheme not “to the satisfaction of the Board”—Discretion—Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6, c. 16), s. 16, Sched.—Companies Act, 1947 (10 & 11 Geo. 6, c. 47), s. 117.

A trust deed propounding a scheme for an “authorized unit trust scheme” for the purposes of the Prevention of Fraud (Investments) Act, 1939, as amended by the Companies Act, 1947, was submitted for the approval of the Board of Trade pursuant to the Act of 1939. The Board objected to the proposed size of the initial service charge which was included in the sale price of a unit, on the ground that it was too high, and refused to approve the scheme.

The plaintiff company, as manager of the scheme, contended that since the scheme contained all the matters specified in the Schedule to the Act pursuant to section 16 (1) (c), the Board of Trade were not entitled to refuse their approval on some other ground:—

Held, (1) that the deed not only had to contain the matters referred to in the Schedule, but it was also required by section 16 (1) (c) to provide for them “to the satisfaction” of the Board of Trade, and if the Board failed to be so satisfied, they were entitled to refuse approval of the scheme as an “authorized unit trust scheme.”

(2) That in the present case the Board were entitled to refuse to make the order because they thought that the initial service charge had been fixed at too high a rate.

Semble: The Board of Trade have a general discretion under section 16 (1) (c) to refuse to authorize a scheme whether or not the conditions in the Schedule are fulfilled.

ADJOURNED SUMMONS.

The plaintiff company constituted a unit trust scheme on March 23, 1936, called the “Electrical Industries Trust,” to be determined on March 23, 1956, of which the plaintiff was the manager. In 1953 proposals were made for the continuance of the “Electrical Industries Trust” scheme by means of a trust deed which was submitted to the Board of Trade under the name of “Electrical Industries Trust, Second Series.” That deed contained a provision under which the manager was given power to make an initial service charge, and which was expressed as

follows: " 'The initial service charge' means a charge which
 " may be included in the sale price (as defined below) of a unit
 " and which shall not exceed five and one-half per cent. of the
 " sale price of such unit (without taking into account the
 " adjustment mentioned in the definition of sale price)." The
 " sale price " of a unit was defined as " a price at which the
 " managers offer units for sale and which shall not exceed a
 " price arrived at by taking:—(a) the value of the investments
 " comprising the trust fund computed at the lowest Stock
 " Exchange dealing offered price at the time as near as may be
 " at which the unit is quoted or sold by the managers and (b) all
 " cash held by or on behalf of the trustees for account of the
 " trust and any other property belonging to the trust and (c) any
 " duties and charges in respect of the purchase of the investments
 " and the issue of certificates in respect thereof and any duties
 " and charges which would have been payable if the units quoted
 " or sold had to be constituted at the said time and by dividing
 " the aggregate of these items by the number of units constituted
 " at the said time and adding to the amount so ascertained the
 " initial service charge (if any) calculated as described in the
 " definition of the initial service charge and adding to the price
 " so ascertained an adjustment not exceeding three pence per
 " unit or one per centum of the said sale price so ascertained
 " whichever is the lesser."

Objection to that provision was taken by the Board of Trade
 in a letter dated September 4, 1953, in which they stated: " the
 " size of this charge is regarded as an integral part of the manner
 " in which the sale price of the units is determined and therefore
 " as a matter which must be provided for to the satisfaction of
 " the Board of Trade under section 16 of the above Act. I
 " should add that the Board have so far insisted that the pre-
 " liminary service charge should not exceed 2 per cent. and that
 " the semi-annual service charge should not exceed $\frac{1}{2}$ per cent.
 " (per half year). Such figures are now incorporated in the deeds
 " of a number of trusts and the Board have no reason to regard
 " them as inadequate. It is not therefore possible to agree to
 " the maximum initial service charge of $5\frac{1}{2}$ per cent. referred to
 " in your letter of July 31, 1953."

As a result of that objection by the Board of Trade the trust
 deed prepared on behalf of the plaintiff company was withdrawn
 and a fresh trust deed was put forward, which was dated
 October 20, 1954, having received the approval of the Board of
 Trade on that date. This trust deed avoided for the time being

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the difficulty which had been experienced with the Board of Trade, as the provision as regards the initial service charge was: " 'The initial service charge' means a charge which may after the execution of the supplemental deed mentioned in clause 3 hereof be included in the sale price (as defined below) of a unit." The provision as to sale price followed similar provisions of the earlier deed. Eventually, the further deed was put forward on behalf of the plaintiff which fixed the amount of the initial service charge, and objection was again taken by the Board of Trade, the provision to which they objected being: " 'The 'initial service charge' means a charge which may be included in the sale price (as defined below) of a unit and which shall not exceed 5 per cent. of the sale price of such unit without taking into account the adjustment mentioned in the definition of 'sale price.' " The figure of 5 per cent. was only $\frac{1}{2}$ per cent. below the figure named in the original deed put forward, and when the Board of Trade again took objection they added an additional reason for their refusal to approve the deed. This was expressed in their letter of April 21, 1955, in the following terms: " It is the view of the Board that they have a discretion in the exercise of their power under section 16 of the 'Prevention of Fraud (Investments) Act, 1939.'¹ They do not

¹ Prevention of Fraud (Investments) Act, 1939, as amended by s. 117 of the Companies Act, 1947, s. 16: "(1) The Board of Trade may by order declare to be an authorized unit trust scheme for the purposes of this Act any unit trust scheme in relation to which the Board are satisfied that the following conditions are fulfilled, that is to say:—(a) that each of the persons who are respectively the manager and the trustee under the scheme is a corporation incorporated under the law of some part of the United Kingdom, and having a place of business in Great Britain at which notices and other documents are received on behalf of the corporation, and (b) that the scheme is such that the effective control over the affairs of the corporation which is the manager under the scheme is and will be exercised independently of the corporation which is the trustee under the scheme, and (c) that the scheme is

"such as to secure that any trust created in pursuance of the scheme is expressed in a deed providing, to the satisfaction of the Board, for the matters specified in the Schedule to this Act. . . ."

Subs. (2): "If, with respect to any authorized unit trust scheme, the Board of Trade consider that the order declaring the scheme to be an authorized unit trust scheme ought to be revoked on either of the following grounds, that is to say—(a) that the conditions specified in paragraphs (a) to (d) of the preceding subsection are no longer fulfilled in the case of that scheme, or (b) that the circumstances relevant to the making of an order have materially changed since the making thereof, the Board may serve on the manager under the scheme and on the trustee under the scheme a written notice that they are considering the revocation of the order on that ground, specifying the respect in

“consider that their power is coupled with a duty so that they
 “are bound to make an order if the conditions (a) to (d), speci-
 “fied in subsection (1) of that section, are fulfilled. In this
 “connexion, I would point out, for example, that to fulfil con-
 “dition (c) it is necessary for the terms of the deed to provide,
 “*to the satisfaction of the Board*, for the matters specified in
 “the Schedule to the Act.”

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By this summons the plaintiff company asked the court, inter alia, to determine: (a) whether on the true construction of the Prevention of Frauds (Investments) Act, 1939, as amended by section 117 of the Companies Act, 1947, if the Board of Trade were satisfied that the conditions set forth in section 16¹ of the Act of 1939 were fulfilled in relation to a unit trust scheme, the Board were entitled to refuse to declare the said scheme to be an authorized unit trust scheme for the purposes of the Act, and (b) whether in so doing they were entitled to take into consideration the size of any initial service charge for which the deed provided.

S. Pascoe Hayward Q.C. and *Michael Wheeler* for the plaintiff company. The Board of Trade were wrong in their refusal to declare the plaintiffs' scheme to be an authorized unit trust scheme, and it was not a proper exercise of their discretion under the Prevention of Fraud (Investments) Act, 1939. The Board of Trade have a discretion under the Act, but it must be exercised in accordance with the provisions of that Act, and this they have not done. The exercise of their discretion being based on the misinterpretation of the statute which they purport to administer,

“which the said conditions are no
 “longer fulfilled or the said circum-
 “stances have changed, as the case
 “may be, and inviting the manager
 “and the trustee to make to the
 “Board . . . any representations
 “which they desire to make with
 “respect to the proposed revocation
 “of the order; . . .”

S. 26: “. . . ‘authorized unit trust
 “‘scheme’ means any unit trust
 “scheme declared by an order of the
 “Board of Trade for the time being in
 “force to be an authorized unit trust
 “scheme for the purposes of this
 “Act. . . .”

“‘unit trust scheme’ means any
 “arrangements made for the purpose,
 “or having the effect, of providing

“facilities for the participation by
 “persons, as beneficiaries under a
 “trust, in profits or income arising
 “from the acquisition, holding,
 “management or disposal of
 “securities or any other property
 “whatsoever.”

Sched.: “Matters for which Trust
 “Deeds pursuant to Unit Trust
 “Schemes must provide. 1. For
 “determining the manner in which
 “the manager's prices for units on
 “a sale and a purchase and the
 “yield therefrom are to be respec-
 “tively calculated and for entitling
 “the holder of any units to require
 “the manager to purchase them at
 “a price calculated accordingly.”

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the court has jurisdiction to interfere. Maxwell on Interpretation of Statutes, 10th ed., p. 123, and *Inland Revenue Commissioners v. Ross and Coulter*.²

The deed contained all the matters required by paragraph 1 of the Schedule to the Act, and the Board of Trade cannot assert that it does not comply with the Act, in that the scheme does not provide what is required by it. The Board of Trade, however, are insisting on being satisfied on matters which are not prescribed in the Schedule. The Schedule prescribes the matters which trust deeds must provide "pursuant to unit trust schemes," and it provides in paragraph 1 for the determination of "the manner" in which the manager's prices for units on a sale . . . are to be " . . . calculated . . ." This is clear from the terms of the deed which the plaintiffs have put forward.

The Board of Trade have refused to give their approval to the scheme because they thought that the initial service charge affected the method of calculating the sale price, and it is clear that it was the size of the initial service charge that caused them to refuse to make the order. But the size of the initial service charge is not a matter within their statutory discretion; it is not prescribed by the Schedule. It is a question of construction of the Act whether the size of the initial service charge is an integral part of the calculation of the sale price. The plaintiffs submit that it is not; it is not within the matters prescribed by paragraph 1 of the Schedule, and, as the discretion of the Board of Trade should be limited to the matters in the Schedule, this is a case in which the court should interfere by declaring that the Board were not entitled to refuse to declare this scheme to be an authorized unit trust scheme.

Denys Buckley for the Board of Trade. This question turns on the construction of section 16 of the Act, which is not mandatory in terms but permissive. It is established by *Julius v. Bishop of Oxford*³ that where a statute is couched in permissive language, it must prima facie be construed on its ordinary meaning, but a statute may confer a power coupled with a duty, then the person having the power may be bound to exercise it. Section 16 does not contain any such power.

The discretion of the Board of Trade under section 16 is not confined to the matters set out in the Schedule. Examination of the Act shows that the powers of the Board of Trade under the Act are in certain sections permissive (i.e., empowering the Board of Trade to do certain things) and imperative in others.

² [1948] 1 All E.R. 616, 629.

³ (1880) 5 App.Cas. 214.

[Reference was made to sections 1 to 16 of the Act.] Under section 16 (2) the Board of Trade have power to revoke an order declaring a scheme to be an authorized unit trust scheme.

[DANCKWERTS J. The section makes no provision for any hearing; that is rather odd, is it not?]

It does not in terms say so. It is an administrative power of the Board of Trade for the protection of the public. It is important that the public should be protected in that way. There is no public access to this kind of trust document and these powers are given to the Board of Trade as guardians of the public. That is why the language used is not mandatory and the Board of Trade has a discretion to say whether any particular scheme is entitled to be an authorized unit trust scheme; and although the scheme may contain all the matters prescribed in the Schedule, they must on the true construction of section 16 (1) (c) be provided "to the satisfaction" of the Board of Trade, which has a discretion therefore to say whether or not these matters are prescribed to their satisfaction.

The Board of Trade are entitled to take into consideration the amount of the remuneration which the promoters are able to take out under the scheme. The amount of the initial service charge must be part of the manner of calculating the sale price. So far the Board have said that this charge should not exceed two per cent., and that is a perfectly fair exercise of their discretion.

Further, the words "to the satisfaction of the Board" in section 16 confer on them a general discretion, and do not go merely to the form of the deed (i.e., whether the deed contains the particulars in the Schedule), but to the substance of it. If it only went to form, paragraph 4 of the Schedule would become nonsense. The percentage of the initial service charge, which is part of the manner of calculating the sale, is a matter on which the Board have to be satisfied not only as to form but as to substance.

The plaintiffs are not therefore entitled as of right to have their scheme declared to be an authorized unit trust scheme, and the Board of Trade can refuse to authorize it, notwithstanding that the particulars required by the Schedule are given.

Pascoe Hayward Q.C. replied.

DANCKWERTS J. This is an application by a company in respect of a unit trust scheme for the purpose of which the court is asked to construe certain provisions of the Prevention of Fraud (Investments) Act, 1939, as amended by the Companies Act,

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1947. The general purpose of the Act of 1939 is to prevent the public being induced to part with their money by the blandishments of fraudulent persons in regard to investment in shares or other securities. The Act contains provisions prohibiting dealings in securities, but the immediate provisions with which I am concerned are those which provide certain exemptions from the prohibitions of the Act.

I will consider the general provisions of the Act later; for the moment it is necessary to see how the question arises. Among the exemptions are those concerned with authorized unit trust schemes. An authorized unit trust scheme is defined by section 26, the interpretation section of the Act, to mean "any unit trust scheme declared by an order of the Board of Trade for the time being in force to be an authorized unit trust scheme for the purposes of this Act."

[His Lordship having read the relevant sections of the Act, stated the facts and continued:] Mr. Pascoe Hayward, although admitting that the Board of Trade have some kind of discretion, said that it was a discretion which could only be exercised by them on a true construction of the Act. His contention was, that if the deed put forward on behalf of the plaintiff company contained the provisions which are required to be in the deed pursuant to the terms of the Schedule to the Act, it was not open for the Board of Trade to take objection on some further ground. He referred me to the following statements in Maxwell on Interpretation of Statutes, 10th ed., p. 123: first, "Where, as in a multitude of Acts, something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute. 'According to his discretion' means, it has been said, according to the rules of reason and justice, not private opinion; according to law and not humour; it is to be, not arbitrary, vague and fanciful, but legal and regular; to be exercised, not capriciously, but on judicial grounds and for substantial reasons." Then appears this passage: "Moreover, if a public authority bases its exercise of discretion on a misinterpretation of the statute which it purports to administer, the court has jurisdiction to interfere." There follows on p. 124 this quotation of Lord Thankerton in *Inland Revenue Commissioners v. Ross and Coulter*,¹ who said²: "'I apprehend, generally speaking, the courts are not entitled to interfere'

¹ [1948] 1 All E.R. 616.

² Ibid. 629.

“(with a discretionary power given by a statute) ‘ unless either
 “ ‘ (a) the exercise of the discretion has not complied with the
 “ ‘ conditions provided by the statute for the exercise of the dis-
 “ ‘ cretionary power . . . or (b) the power has not been exercised
 “ ‘ judicially.’ ”

Those statements are no doubt completely unexceptionable, but the difficulty that I experience is how to apply them to the facts of the present case. Mr. Pascoe Hayward has quite reasonably pointed out that the provisions of the deed cannot really be attacked on the ground that they do not show the necessary matters prescribed in paragraph 1 of the Schedule “ For determining the manner in which the manager’s prices for units
 “ on a sale and a purchase and the yield therefrom are to
 “ be respectively calculated and for entitling the holder of any
 “ units to require the manager to purchase them at a price
 “ calculated accordingly.” He is perfectly correct in saying that if the terms of the deed are before one, one can see what are the matters to be taken into consideration on fixing the manager’s prices for units on a sale and a purchase respectively, including the initial service charge, and that it is merely a mathematical calculation to ascertain the various portions of the price which are made up from those respective matters. They are known; there is, therefore, Mr. Pascoe Hayward submitted, on the face of it, a satisfaction of the provisions of the schedule in paragraph 1 of the deed, and the Board of Trade have no power to require compliance by the plaintiff with other things which the Board may think are advisable in the interests of the public or for some other good reason, but which are not required by the terms of the Schedule.

So far, it seems to me that the argument of Mr. Pascoe Hayward would be perfectly satisfactory; but section 16 shows that that is not the whole question, because first of all the Board of Trade are empowered to “ declare to be an authorized unit
 “ trust scheme for the purposes of this Act any unit trust scheme
 “ in relation to which the Board are satisfied that the following
 “ conditions are fulfilled,” and then the conditions to which I have already referred are given. Condition (c) is “ that the
 “ scheme is such as to secure that any trust created in pursuance of the scheme is expressed in a deed providing ”—and here is the important passage—“ to the satisfaction of the Board,
 “ for the matters specified in the Schedule to this Act.” It seems to me, therefore, that assuming there is provision in the deed for the matters specified under heads 1 to 6 in the Schedule

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to the Act, the question still arises: are those matters provided for to the satisfaction of the Board, and may the Board fail to be satisfied with the provisions contained in the deed because the Board think that the provisions are inimical to the public interest and possibly unfair on the investors who will be induced to invest their money pursuant to the scheme?

There is no suggestion, and there could not be any, against the good faith of the Board of Trade in the present case; but they have expressed their reason for taking objection to the plaintiff's scheme, and the question is whether that objection is one which the Board of Trade were entitled to take under section 16. I am not for the moment considering the larger point which was taken on behalf of the Board of Trade, namely, that they have a general discretion under this section conferred by the Act which enables them, if they think proper to do so, to refuse to issue any order at all, whether or not the provisions in the Schedule are contained in the deed. I am considering now the shorter matter which depends simply on the proper construction of section 16 (1) (c) of the Act. It seems to me that the matter is not in any way disposed of by Mr. Pascoe Hayward's argument that the Board have only a discretion according to the true construction of the Act, because what I am trying to ascertain at the present moment is the true construction of the Act.

I have come to the conclusion that on the true construction of the Act the plaintiff company is bound to set forth in its deed the matters which are referred to in paragraphs 1 to 6 of the Schedule, but that that must be done to the satisfaction of the Board; therefore, if the Board is not satisfied with the terms of the provisions in the deed relating to the matters prescribed in the Schedule, it is open to the Board of Trade to take objection. It seems to me that in the present case, when the Board of Trade considered that the initial service charge was fixed at an unfairly high rate, they were entitled to take an objection and they were entitled to refuse to make an order pursuant to section 16 of the Act.

That is, in itself, sufficient to dispose of the case, but I will mention the alternative argument put forward by Mr. Buckley on behalf of the Board of Trade. He submitted that the Board of Trade had a general discretion under section 16, quite apart from the point which I have decided under paragraph (c) of subsection (1), to exercise their judgment as to whether a unit trust scheme should be authorized, having regard to the interests of the public and the fairness of the scheme. He has pointed

to the word "may" in the first few words of the section, which is plainly a permissive word, and he said that that has to be contrasted with certain provisions in the Act which are of an imperative character. I will therefore consider as briefly as I can the other provisions of the Act. Section 1 contains provisions prohibiting any person from carrying on, or purporting to carry on, "the business of dealing in securities except under the authority of a principal's licence, that is to say, a licence under this Act authorizing him to carry on the business of dealing in securities, or (b) in the capacity of a servant or agent of any person carrying on or purporting to carry on that business . . ."; that is, in a representative capacity. That section provides for the grant of licences, and section 2 contains provisions which exempt certain transactions: "The restrictions imposed by section 1 of this Act in relation to dealing in securities shall not apply to the doing of anything by, or on behalf of,—(a) a member of any recognized stock exchange or recognized association of dealers in securities, or (b) the Bank of England, any statutory corporation or municipal corporation, any exempted dealer or any industrial and provident society or building society, or (c) any person acting in the capacity of manager or trustee under an authorized unit trust scheme." Section 3 is concerned with applications for, and grant and extent of, licences, and the language of the section is as follows: "(1) Subject to the following provisions of this Act, the Board of Trade—(a) upon an application in that behalf made by any person in the prescribed manner, and on payment of the prescribed fee, shall grant to that person a principal's licence, and (b) upon an application made by any person in the prescribed manner, and on payment of the prescribed fee, shall grant to that person a representative's licence." There follow provisions which prescribe how long the licence shall continue, and certain other provisions. The matters contained in section 4 need not be referred to; section 5 contains provisions for refusal and revocation of licences, and under that section, "Subject to the provisions of this section, the Board of Trade may refuse to grant an application for a licence or, where a licence has been granted, may revoke the licence"; and then there are certain provisions, which I need not read in detail. Section 7 gives the Board of Trade power to make rules with regard to the conduct of business of licensed dealers; section 8 relates to the information to be furnished to the Board of Trade by holders of licences, and section 9 provides for publication of

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names of holders of principals' licences, and in sections 10 and 11 there are certain provisions relating to particular societies. Section 12 contains penalties for fraudulently inducing persons to invest money. Section 13 provides restrictions on the distribution of circulars relating to investments, and subsection (3) contains certain exemptions from the previous prohibition, which includes, amongst others, any invitation or information "made or given" "with respect to any securities by or on behalf of a member" "of any recognized stock exchange or recognized association of" "dealers in securities, or by or on behalf of the holder of a" "principal's licence"; and (iv) is: "made or given by or on" "behalf of the manager under an authorized unit trust scheme" "with respect to any securities created in pursuance of that" "scheme . . ." Then section 14, which relates to stock exchanges and associations of dealers in securities, provides that "The Board of Trade may by order declare any body of persons" "carrying on in Great Britain the business of dealing in securities" "to be a recognized stock exchange or recognized association" "of dealers in securities for the purposes of this Act." Then follows power to vary or revoke by subsequent order of the Board of Trade. Mr. Buckley said that that was another case like the present, where there was a discretion and not an absolute and imperative requirement that the Board of Trade should make an order or declaration. Section 15 contains the exemptions of certain dealers.

The point of the review of the sections which I have made is that there is in regard to licences an imperative provision requiring the Board of Trade to issue a licence if the conditions are satisfied. But, in contrast with that, there are in certain other sections of the Act, and in particular in section 16, a provision which is merely an empowering provision.

Mr. Buckley has called my attention to a leading case on the subject, *Julius v. Bishop of Oxford*,³ where there was a power conferred on the Bishop of Oxford to institute an inquiry in certain circumstances, and it was held by the House of Lords that he might have a duty to consider the matter but that that was the extent of his duty, and he was not bound to issue the inquiry which was provided for by the terms of the Act, namely, the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), which was merely an empowering provision. The House of Lords contrasted with that certain cases in regard to bankruptcy law and other matters—"aids to execution" one might term

³ (1860) 5 App.Cas. 214.

them—where private rights were intended to be conferred by the Act, and although the word “may” might be used, the Act intended that a duty should be placed on the authority concerned to act in the matter and to make an order if the applicant came within the terms provided for in the statute. Is it right in the circumstances that the Board of Trade have a general discretion which entitles them, in the proper exercise of a kind of semi-judicial function, to consider whether they should refuse to authorize unit trust schemes, even though the deed does contain the particulars which are required to be stated by the Schedule to the Act? There is much to be said for the argument that the Board of Trade have this general discretion, and that under the terms of the Act they are not bound to make an order merely because the matters stated in the Schedule are duly contained in some form or other in the deed submitted to them. Were it necessary for me to do so, I should be inclined to come to the conclusion that the Board of Trade had such a discretion, but in view of the conclusion which I have reached on section 16 (1) (c) of the Act it is not strictly necessary for me to give any final view on the question, and I will not, therefore, express any more positive view than I have done.

In the result the application made on behalf of the plaintiff must be refused, and the summons will be dismissed.

Summons dismissed.

Solicitors: Coward, Chance & Co.; The Solicitor, The Board of Trade.

I. G. R. M.

In re BISS, DECED. HEASMAN *v.* BISS.

[1953 B. 5990.]

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Dec. 6, 7.

Harman J.

Administration of Estates—Payment of debts—Property liable—Mortgaged property—Part specifically devised and part falling into residue—Exoneration of specifically devised realty from mortgage debt to extent of remainder of mortgaged property—Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 35.

A testator mortgaged certain realty and personalty to the bank to secure his overdraft. Part of the mortgaged realty was specifically devised and the remainder fell into residue. The testator did

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not give any express direction that the specific devise of the mortgaged realty should not bear a proportionate part of the mortgage debt.

The will contained a direction that if the specific devisee or her successors in title should at any time wish to sell the property specifically devised to her, an option to purchase it for £2,000 should first be given to a company in which the testator had been interested. On a summons taken out to determine, inter alia, on what property should fall the liability for the mortgage debt:—

Held, (1) that the option did not show an intention to exclude the operation of section 35 of the Administration of Estates Act, 1925.¹

(2) That since part of the mortgaged property was specifically devised and part of it fell into residue, that indicated a sufficient intention to exclude the provision in section 35 that every part of the property should bear a proportionate part of the charge, and the specifically devised property was accordingly exonerated to the extent of the property which fell into residue.

Brownson v. Lawrance (1868) L.R. 6 Eq. 1 applied.

ADJOURNED SUMMONS.

James Stanley Biss, by his will dated November 2, 1951, appointed his sons, the defendants Stanley George Biss and Roger David Biss (the latter on attaining the age of 21 years), and his brother, the defendant Robert Warland Biss, to be the executors and trustees of his will. He gave his freehold properties not thereafter specifically devised and his leasehold premises to his trustees on trust for sale to form part of his residuary estate subject to a payment of £20 a month to his wife for her life.

By clause 6 of his will the testator provided: "I devise and bequeath the freehold premises situate and known as Denver Lodge and field at present enjoyed therewith containing an area of four acres or thereabouts together with all buildings thereon

¹ Administration of Estates Act, 1925, s. 35: "(1) Where a person . . . by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise . . . and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every

"part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

"(2) Such contrary or other intention shall not be deemed to be signified—(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or (b) by a charge of debts upon any such estate. . . ."

“ unto Miss Pamela Ruth Joyce Heasman [the plaintiff] absolutely on condition and provided nevertheless that if at any time she or her successors in title require or desire to sell the same or any part thereof the whole shall first be offered in writing to J. S. Biss & Co. Ltd. [the defendant company] who shall have an option of one month from the date of such notice in writing to exercise such option to purchase the same for the sum of £2,000. . . .”

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Clause 8 provided: “ I devise and bequeath all the rest and residue of my property whatsoever and wheresoever which I may die possessed of or entitled to (including all shares and other interests held by me in the [defendant] company at the date of my death) unto my trustees upon trust after payment thereout of all my just debts funeral and testamentary expenses to divide the same equally between such of my two children the said Stanley George Biss and Roger David Biss as shall survive me and attain the age of 21 years . . .” with gifts over in the case of a son predeceasing the testator.

In March, 1950, the testator, who had seven separate trading accounts with the Midland Bank and a private account, borrowed £10,000 from the bank, which was credited to his private account and secured by three mortgages: (a) by a legal mortgage dated March 2, 1950, on the property known as Denver Lodge and the neighbouring or adjoining farm buildings, land and fields held therewith; (b) by a legal mortgage of property known as St. Boniface, Theobald Park Road, Crews Hill, Enfield; (c) by a mortgage of or charge on 44 shares of £50 each in the Woolwich Equitable Building Society; (d) certain collateral security consisting of a guarantee given by the testator's wife. The mortgages were expressed to be a security for all sums due from the testator on any account. In July, 1951, the testator reduced the mortgage debt by £2,000.

The testator died on March 9, 1952. At the date of his death there remained outstanding on the mortgages to the bank the sum of £7,328, together with a further sum of £70 12s. 4d. in respect of bank charges. This sum represented the balance due on all the testator's accounts after setting off credits.

The plaintiff took out the present summons to have determined certain questions of construction arising on the will of the testator. The question on the summons relevant to this report was whether or not the freehold premises specifically devised to the plaintiff were liable to bear a proportionate part of the testator's debt

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charged by the mortgages, or whether such debt ought to be discharged wholly out of the residuary estate in which was included part of the mortgaged property.

The value of the mortgaged properties for the purpose of estate duty was: (1) Denver Lodge and the neighbouring or adjoining land and fields, £10,000; (2) St. Boniface, £1,500; (3) 44 shares in the Woolwich Equitable Building Society, £2,200.

Harman J., in a judgment which does not call for a report, held that the specific devise to the plaintiff in clause 6 of the will comprised Denver Lodge and adjoining buildings and land to the total value of £7,250; the remainder of that land fell into residue.

Michael Albery Q.C. and C. F. Fletcher-Cooke for the plaintiff, *Ruth Pamela Joyce Heasman*. This will shows a contrary intention sufficient to exclude section 35 (1) of the Administration of Estates Act, 1925. The option given by clause 6 of the will is to purchase the property free from incumbrances, and therefore free from any part of the mortgage debt: see *In re Fison's Will Trusts*.² The original devise of the property must therefore equally have been free from incumbrances. It cannot have been intended that the devisee should take the property burdened with a debt of over £3,000, which she could only sell for £2,000 free from any debt. The devise must be presumed to have been intended to be beneficial and not to impose a burden.

Alternatively, if section 35 (1) is not wholly excluded, at least an intention is shown to exclude the final provision of the subsection, that "every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole . . ."

In *Brownson v. Lawrance*³ it was held that where one of two properties subject to a single mortgage was specifically devised, and the other mortgaged property passed under a residuary devise, the testator had signified a contrary intention within the meaning of Locke King's Act (now section 35), so as to make the estate which passed under the residuary devise primarily liable for the whole of the mortgage debt. That case was overruled on the ground that a residuary devise of realty was then considered to be specific: see *Hensman v. Fryer*⁴ and *Gibbins v. Eyden*.⁵ But since 1925 a residuary devise of realty is no longer specific, and residuary real and personal estate are equally liable for the

² [1950] Ch. 394; 66 T.L.R. (Pt. 1) 475; [1950] 1 All E.R. 501.

³ (1868) L.R. 6 Eq. 1.

⁴ (1867) L.R. 3 Ch. 420.

⁵ (1869) L.R. 7 Eq. 371.

payment of debts: see section 34 (3) of, and Part II of the First Schedule to, the Administration of Estates Act, 1925, and *In re Harland-Peck*.⁶

There is no reason why, now that a residuary devise of realty is not specific, the principle relating to the priority of payments of unsecured debts provided by Part II of the First Schedule should not be applied to secured debts in accordance with the decision in *Brownson v. Lawrance*.⁷

J. P. Hunter-Brown for the testator's brother, Roger Warland Biss, an executor of the will.

R. W. Goff Q.C. and *W. T. Elverston* for the testator's sons, Stanley George and Roger David, and the firm *J. S. Biss & Sons Ltd.* Section 35 of the Administration of Estates Act, 1925, applies to a running account: see *In re Hawkes*.⁸ The section gives a prima facie rule, and the onus is on the plaintiff to show a contrary intention. She sought to do this on two grounds; first, by considering the indications of intention shown by the option provision; and secondly, on the ground that part of the mortgaged property was specifically devised and part was left to fall into residue.

As to the first point, even if, assuming the option to be valid, the company would take free from incumbrances, this does not show an intention that the plaintiff should do so, because the two provisions are different. The plaintiff takes as a direct beneficiary under the will, but the company would take as purchasers. The converse argument was unsuccessfully advanced in *In re Fison's Will Trusts*.⁹

In any case the option price of £2,000 was a purely arbitrary figure and cannot afford an indication of intention to exclude section 35.

As to the second point, where mortgaged property is given specifically and there is an unincumbered residue, the section does prima facie operate to exonerate residue at the expense of the specifically devised property; and it would be wholly illogical, where the mortgaged property is itself divided and part given specifically and part given as residue, that the section should either be wholly excluded or excluded to the extent of making the residuary part of the mortgaged property primarily liable for the debt. [*In re Turner*¹⁰ was referred to.]

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⁶ [1941] Ch. 182; 57 T.L.R. 118;
 [1940] 4 All E.R. 347.

⁷ L.R. 6 Eq. 1.

⁸ [1912] 2 Ch. 251.

⁹ [1950] Ch. 394.

¹⁰ [1938] Ch. 593; 54 T.L.R. 697;
 [1938] 2 All E.R. 560.

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The decision in *Brownson v. Lawrance*¹¹ should not be resuscitated, especially after so many years.

Section 34 (3) of, and Part II of the First Schedule to, the Administration of Estates Act, 1925, does not affect the matter, as this is dealing only with the payment of unsecured liabilities and does not cut across the rule prescribed by section 35.

Albery Q.C. replied.

HARMAN J. The point is whether the property specifically devised to the plaintiff has to bear a proportionate part of the debt to the bank, which is secured on it and other properties. *Prima facie*, that must be so: see section 35 of the Administration of Estates Act, 1925, which somewhat extends the Real Estate Charges Act, 1854 (known as Locke King's Act).

The relevant facts have been difficult to discover. [His Lordship stated the facts and continued:] The net debt at the death of the testator was £7,328 plus some interest. It was said by the executors that the plaintiff was hit by the words "every part" of the said interest, according to its value, shall bear a proportionate part of the charge on the whole . . ." in section 35 of the Administration of Estates Act, 1925. The word "interest" was a curious word to use in that section, but it must mean the aggregate of the properties charged.

The plaintiff is thus liable, on the contention put forward by the executors, to pay off rather more than half the overdraft, and the question that I have to determine is whether a contrary intention is signified by the testator. He had not by deed, will or other document expressly done so, and though it seems highly unlikely that he intended the plaintiff to pay off half the overdraft, the fact that he directed payment of his debts out of residue is not of itself enough having regard to the express terms of section 35 (2) (a).

Two indications were suggested. The first was the option to purchase given to the company. It is said that it would be ridiculous to saddle the devisee with £3,700 (or so) in respect of the charge, and then to provide that she shall not sell for more than £2,000. The right of purchase contained in the option purports to extend to the successors of the plaintiff, and Mr. Albery has argued that so curious an intention could not be imputed to the testator. He argued, moreover, that the option was to purchase free from incumbrances and that the devise must

¹¹ L.R. 6 Eq. 1.

therefore comprise the like subject-matter. But the figure of £2,000 is arbitrary anyhow; it is a mere deterrent, whether or not it is effective. I find no contrary intention here.

The second point relied on was that part of the property charged falls into residue, and residue should rank below specifically devised property. There is no doubt about the payment of the unsecured debts, having regard to section 34 of the Administration of Estates Act, 1925, and Part II of the First Schedule, residuary realty comes first; therefore it was said that a specific devise of part of the property put it in a higher class, and is an indication that it should not suffer before the lower class is exhausted. That construction appeals to me, apart from authority. If one were dealing with unsecured debts, the specifically devised property would be above residue, and why should not that apply to secured debts as well?

There is some authority for this in *Brownson v. Lawrance*,¹ where Lord Romilly so held, but did not give any reasons for his decision. The circumstances were not unlike those existing here, and Lord Romilly decided that the specific devise of part of the mortgaged property did indicate a contrary intention. The case itself was overruled, the reason being that before 1925 residuary realty was not put behind specifically devised realty—both were specific. That is not so since 1925, as the Administration of Estates Act distinguishes between a specific and residuary devise, so that the conclusion of Lord Romilly would now rest on a true premise. In *In re Turner*² Simonds J. did not take the point, but it was not suggested he should; that is therefore no authority. In my judgment, the point is a good one. I therefore hold that to the extent of the value of the rest of the mortgaged property the plaintiff's property is exonerated. That would leave the plaintiff with some burden.

Order accordingly.

Solicitors: *Guillaume & Sons; Amphlett & Co.; Breeze & Wyles.*

I. G. R. M.

¹ (1868) L.R. 6 Eq. 1.

² [1938] Ch. 593; 54 T.L.R. 697;
[1938] 2 All E.R. 560.

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BISS, DECED.,
In re.
Harman J.

1956
Jan. 12.

In re COLLBRAN, DEC'D.

Upjohn J.

Trading with the Enemy—Distribution of enemy property—Claim—Unliquidated damages—Breach of covenant to repair—Amount not quantified—Not a “sum due”—Distribution of German Enemy Property Act, 1949 (12, 13 & 14 Geo. 6, c. 85), s. 8 (1)—Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951, No. 1899), cl. 5 (6).

A claim for unliquidated damages is not a “sum due” within the meaning of section 8 (1) of the Distribution of German Enemy Property Act, 1949, which can rank as a claim under that Act.

A lessor of a freehold house claimed to be entitled to participate under the Distribution of German Enemy Property Act, 1949, in respect of damages for breach of a covenant to repair contained in a lease of the house made in 1936. The breach had been committed by the lessee who was on September 3, 1939, and at all material times thereafter, a German national resident in Germany. The amount of damages was not quantified or ascertained and the Administrator of German Enemy Property rejected the claim on the ground that the claim being one for unliquidated damages it was not a “sum due” within the meaning of section 8 (1) of the Act. On a case stated by the Administrator:—

Held, that until the breach of covenant was established and the amount due in respect of the breach had been quantified, or until the parties had otherwise agreed the amount, there was no “sum “due” but only a chose in action, and the decision of the Administrator in rejecting the claim was correct.

O’Driscoll v. Manchester Insurance Committee [1915] 3 K.B. 499; 31 T.L.R. 532 applied.

CASE STATED.

The claimant, Caroline Catherine Begent Collbran, deceased, was the owner of a freehold dwelling-house in Wimbledon, which she demised to one, Theodor Boettiger, by a lease dated December 11, 1936, for a term of seven years from December 25, 1936, on terms and conditions which included a covenant by the lessee well and substantially to repair and keep in repair the house. Boettiger left England either on or shortly before September 3, 1939, and was on that date and at all material times thereafter a German national resident in Germany. By a vesting order dated May 21, 1940, made under the Trading with the Enemy Act, 1939, the Custodian of Enemy Property was authorized to surrender the lease to the claimant. By a deed of surrender dated October 13, 1941, the Custodian of Enemy Property surrendered the lease to the claimant on certain conditions, one of which was that the surrender should be without

prejudice to the claimant's claim for damages for breach of the covenants in the lease. The claimant claimed that when Boettiger left the country he was in breach of his covenant to repair the house.

It was conceded that it was unnecessary to show any breach before September 3, 1939, and that it was sufficient if there were a breach at the date of surrender. The claimant asked certain agents to make an inspection of the property, and they prepared a schedule of dilapidations in 1940 which showed that some £300 would be required, according to their view, to put the house into a proper state of repair. It was not contended that this estimate had the effect of turning an unliquidated sum into a liquidated sum. His Lordship found, however, that the claimant had *prima facie* a good claim for damages for breach of covenant for the failure to repair the house. By a claim dated April 16, 1952, made under the Distribution of German Enemy Property Act, 1949,¹ the claimant claimed to be entitled to participate in the distribution of German enemy property under the Distribution of German Enemy Property (No. 2) Order, 1951, in respect of the sum of £307 14s. 6d. for breach of the covenant to repair contained in the lease of 1936.

That claim was submitted to the Administrator of German Enemy Property, who rejected it on November 11, 1954, on the

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¹ Distribution of German Enemy Property Act, 1949, s. 1: "(1) His Majesty may by Order in Council 'make provision for the collection and realization of German enemy property and for the distribution of the proceeds thereof, to such extent as may be prescribed by the order, to persons who establish claims in respect of German enemy debts.'" S. 8: "(1) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say— 'German enemy debt' means— '(a) any sum due at the passing of this Act [December 16, 1949] in respect of an obligation incurred before September 3, 1939, which on that day was an obligation of any of the following persons— . . . (ii) any individual who on that day was a German national resident in Germany . . .'"

Distribution of German Enemy Property (No. 2) Order, 1951, Part IV, is headed "Amount for which claims permitted to rank." Cl. 5: "(1) The amount for which claims which are not excluded under Part II of this Order may be admitted for payment shall be ascertained by the Administrator in accordance with the following provisions of this Article." Sub-cl. (2), (3), (4) and (5) relate respectively to claims arising out of "bonds, credits, advances or other indebtedness which fell under the German Credit Agreement of 1939," and "claims arising out of other loans" and "claims arising out of trade debts." Sub-cl. (6): "In respect of any claims arising out of any obligation not mentioned in any of the preceding paragraphs of this article, the amount shall be the sum due at the passing of this Act."

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ground that it was a claim for damages for breach of covenant which was unliquidated in amount and that such a claim was not a "German enemy debt" as defined in section 8 (1) of the Act of 1949. The Administrator at the request of the claimant stated a case for the opinion of the court as to whether he was correct in rejecting the claim on that ground.

The claimant had died on January 18, 1954, and her claim was prosecuted by her personal representatives; the term "claimant" is used to denote either the claimant herself or her personal representatives.

Peter Bristow for the claimant. This claim was wrongly rejected by the Administrator. It is not in dispute that there had been a breach of covenant when the lease was surrendered in 1940, and that it was unnecessary to prove any breach before then. The lessee was admittedly at all material times a German national resident in Germany. The claim is, therefore, for a "sum due" at the passing of the Distribution of German Enemy Property Act, 1949, within the meaning of section 8 (1) (a) of that Act, although the exact amount has not yet been ascertained conclusively, and accordingly the claimant is entitled to participate under the Act. The fact that the amount has not yet been ascertained should not exclude this claim; the evidence is quite clear about the amount of dilapidations and there can be no difficulty in assessing what is the "sum due."

Denys Buckley and *N. C. Browne-Wilkinson* for the Board of Trade. Until judgment is recovered by the claimant for breach of this covenant there can be no "sum due" under section 8 (1), as there can be no claim in respect of unliquidated damages. This is a claim for damages for breach of covenant and nothing else; it is a chose in action. There can be no debt in respect of unliquidated damages until they have been liquidated, and the amount ascertained; see *O'Driscoll v. Manchester Insurance Committee*² and *Moss' Empires Ltd. v. Olympia (Liverpool) Ltd.*³

This claim is merely a liability until the amount becomes quantified, and had it been intended that clause 5 (6) of the Distribution of German Enemy Property (No. 2) Order, 1951, should bring in claims of this character one would have expected to find some clearer reference to it, and some machinery for

² [1915] 3 K.B. 499, 512; 31 T.L.R. 532.

³ [1939] A.C. 544; 55 T.L.R. 924; [1939] 3 All E.R. 460.

dealing with the difficult questions which would arise. It would be almost impossible and highly inconvenient if the Administrator were charged with the task of estimating the amount of unliquidated damages.

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Section 8 (1) of the Act provides that a "German enemy debt" means "any sum due," and therefore the Act envisages as a sum due something in the nature of a debt, but a claim in damages is not a debt: *F. & K. Jabbour v. Custodian of Israeli Absentee Property*.⁴ The claimant has a right to sue for damages for breach of covenant, but until she obtains judgment and the amount of damages has been ascertained, all that she has is a cause of action, and that cannot be said to be a "sum due" because it is not known what that will be until the action is brought and judgment delivered. A German enemy debt within the meaning of the Act is a sum due; i.e., an ascertained sum presently payable in respect of an obligation incurred before September 3, 1939. This being a claim for unliquidated damages it does not rank therefore for payment under the Act.

Bristow in reply. It is no more difficult for the Administrator to estimate the amount due under this claim than it would be for a trustee in bankruptcy or a liquidator of a company in dealing with claims of this nature. It is said that when the Act refers to a "sum due" it means a debt, but the *Jabbour* case⁵ shows that that cannot be so. Under an assurance policy a sum is due in respect of an obligation to indemnify, and the actual amount claimed has to be ascertained, but that amount is not a debt. The definition of German enemy debt is wide enough to include a claim for unliquidated damages in respect of this obligation which in all other respects would rank as a claim under the Act; the fact that the sum has not yet been ascertained is not sufficient to exclude it.

UPJOHN J. This case stated by the Administrator of German Enemy Property raises the short but interesting question whether a claim for unliquidated damages will rank with other claims so as to receive the benefits of the collection and distribution of property pursuant to the Distribution of German Enemy Property Act, 1949.

[His Lordship stated the facts and read sections 1 (1) and 8 (1) of the Distribution of German Enemy Property Act, 1949,

⁴ [1954] 1 W.L.R. 139, 143, 144; ⁵ [1954] 1 W.L.R. 139, 144.
 [1954] 1 All E.R. 145.

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and clause 5 (1) and (6) of Part IV of the Distribution of German Enemy Property (No. 2) Order, 1951, and continued:]

The question is really one of the construction of section 8 of the Distribution of German Enemy Property Act, 1949. Certain matters are common ground. First of all, a German enemy debt must be "any sum due at the passing of this Act"—that was December 16, 1949—"in respect of an obligation incurred before "September 3, 1939."

It is conceded that in this case the "obligation" for the purposes of the Act was the covenant to repair contained in the lease of December, 1936, which was an obligation arising before September 3, 1939. For that reason it is now common ground that the question whether there was an actual breach of that covenant on or before September 3, 1939, is immaterial. The case proceeds on the footing that there was undoubtedly a breach of some sort by the time that the lease was surrendered. The whole question is, therefore, whether this claim for a breach of covenant to repair can properly be described as a "sum due at "the passing of the Act."

Mr. Bristow, for the claimant, submits that there was a breach of covenant, and he admits that the sum due by way of damages for that breach has not yet been conclusively ascertained or quantified, but, nevertheless, he contends that it can properly be said that there is a sum due which was a sum due at the passing of the Act, and accordingly all that remains is for the Administrator to quantify that sum. I need not refer in detail to the provisions of the order, which plainly empowers the Administrator to call for information and documents that would enable him to establish the quantum which is due.

It is said by Mr. Buckley, for the Administrator, that it would be very difficult, if not almost impossible, for the Administrator to ascertain what was the proper sum quantifying the damages. He submitted that that was one reason why a claim such as this was not intended to be brought within the ambit of the Act. I do not accept that argument. The Administrator has ample powers enabling him to have placed before him the proper information on which he can make his decision as to quantum, and his difficulty is not greater than that of a trustee in bankruptcy or the liquidator of a company who frequently may have to deal with claims of this nature.

That, however, is not an end of the matter, for Mr. Buckley contends that it cannot properly be said that any sum is due

until one of two things has happened, either that the claim for damages for breach of covenant has been litigated and the liability established, the amount due quantified and turned into a judgment debt which then becomes a sum due, or until the parties have either compromised the litigation or have otherwise agreed what sum is due and thereupon that is a liquidated sum which can be admitted under the Act.

One must analyse what is the true nature of the claim put forward in this case. It is a claim for damages for breach of covenant—nothing more, nothing less. That is in essence a chose in action, no doubt assignable. It may be a valuable right, but it is not a debt. That is plain from *O'Driscoll v. Manchester Insurance Committee*,¹ where Swinfen Eady L.J. said this²: “It is contended, however, that there cannot be a ‘debt’ until the amount has been ascertained, and in support ‘of this contention cases have been cited to us where it was ‘attempted to attach unliquidated damages. But in such cases ‘there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given.’ It is, therefore, plain that there was no debt as such due at the passing of the Act.

But that, again, does not conclude the matter, because the words are “any sum due,” not “a debt due.” On the other hand, in section 1 of the Act, the reference is to “German ‘enemy debts,’” and section 8 starts with the words: “‘German ‘enemy debt’ means—(a) any sum due.” Therefore one approaches the construction of section 8 with the view that the draftsman has at any rate primarily in his mind debts or something in the nature of debts. It comes ultimately down to a very short point of construction: is the phrase “any sum ‘due at the passing of this Act’” appropriate to describe a claim for unliquidated damages for breach of covenant or is it not? I have come to the conclusion upon the whole that it is not. No sum is due until two things have happened: first, that it is established that there is in fact a breach of covenant, and, that being established, secondly, the amount due in respect of such breach has been quantified by judgment. Until that has happened, or until the parties have agreed on the payment of a liquidated sum, it cannot be said that any sum is due. In my judgment a mere claim for damages does not fall within the terms of section 8. Accordingly, I have come to the conclusion,

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¹ [1915] 3 K.B. 499; 31 T.L.R.² [1915] 3 K.B. 512.

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although the point is not an easy one, that the decision of the Administrator was right. I will declare that he was right in holding that the claimant's claim in respect of the sum of £307 14s 6d against the lessee is not a "German enemy debt" as defined in section 8 (1) of the Act of 1949.

Declaration accordingly.

Solicitors: *Withers & Co.; The Solicitor, The Board of Trade.*

I. G. R. M.

1955
Nov. 23.

Vaisey J.

In re FINE INDUSTRIAL COMMODITIES LTD.

[00945 of 1950.]

Company—Winding up—Interest on debts—Jurisdiction—Compulsory winding up on ground of insolvency—Company subsequently becoming solvent—Payment in full of debts admitted to proof—Whether interest payable on debts other than judgment debts—Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 3—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 317.
Interest—Jurisdiction to award.

The court has no power, either by statute or under its general jurisdiction, in a winding up of a company on the ground of its insolvency, to award, on the amounts admitted to proof, interest to simple contract creditors of the company, which after payment of such debts in full is left with surplus assets.

A petition was presented and an order made for the compulsory winding up of a company on the ground of insolvency. In the course of the winding up the liquidator successfully prosecuted an action to set aside a debenture. In the result the liquidator had in hand a substantial surplus after paying the company's creditors 20s. in the pound.

On the question whether interest was payable out of the surplus assets of the company on the amounts admitted to proof in respect of (a) a judgment creditor; (b) simple contract creditors:—

Held, that for the purpose of dealing with its surplus assets the company must be deemed to be and always to have been solvent, so that the rules of bankruptcy did not apply, and, accordingly, (1) the judgment creditor was entitled to interest as from the date of the commencement of the winding up; (2) simple contract creditors were not entitled to claim interest on their debts since (i) the claim of a company's creditor in a winding up could not be brought under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934,

as it was not a proceeding for "the recovery of any debt or "damages" within the meaning of the section; (ii) section 317 of the Companies Act, 1948,¹ only applied section 33 (8) of the Bankruptcy Act, 1914, to an insolvent company.

Observations of Giffard L.J. in *In re Humber Ironworks and Shipbuilding Co.* (1869) L.R. 4 Ch. 643, 647 applied.

Semble, that the judgment creditor was entitled (if he had so claimed) to interest as from the date of the judgment.

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ADJOURNED SUMMONS.

Fine Industrial Commodities Ltd. ("the company") was, by an order of the court made on December 11, 1950, ordered to be wound up compulsorily, and by an order dated January 25, 1951, a liquidator was appointed for the purposes of the winding up.

In the course of the winding up it appeared to the liquidator that a debenture, which the company had issued to one of its directors for securing the sum of £22,000, was capable of being impeached. Accordingly, the liquidator, on the advice of counsel, instituted and prosecuted in the Chancery Division an action for having the said debenture set aside. This action was successful and as a result of it the liquidator had in hand the sum of £23,644 4s. Od., having paid the company's creditors 20s. in the

¹ Companies Act, 1948, s. 316:
"In every winding up (subject, in
"the case of insolvent companies, to
"the application in accordance with
"the provisions of this Act of the law
"of bankruptcy) all debts payable
"on a contingency, and all claims
"against the company, present or
"future, certain or contingent, ascer-
"tained or sounding only in damages,
"shall be admissible to proof against
"the company. . . ."

S. 317: "In the winding up of an
"insolvent company registered in
"England the same rules shall pre-
"vail and be observed with regard to
"the respective rights of secured and
"unsecured creditors and to debts
"provable and to the valuation of
"annuities and future and contingent
"liabilities as are in force for the
"time being under the law of bank-
"ruptcy in England with respect to
"the estates of persons adjudged
"bankrupt, and all persons who in
"any such case would be entitled to
"prove for and receive dividends out
"of the assets of the company may
"come in under the winding up and

"make such claims against the com-
"pany as they respectively are en-
"titled to by virtue of this section."

Law Reform (Miscellaneous Pro-
visions) Act, 1934, s. 3: "(1) In any
"proceedings tried in any court of
"record for the recovery of any debt
"or damages, the court may, if it
"thinks fit, order that there shall
"be included in the sum for which
"judgment is given interest at such
"rate as it thinks fit on the whole
"or any part of the debt or damages
"for the whole or any part of the
"period between the date when the
"cause of action arose and the date
"of judgment:

"Providing that nothing in this
"section—(a) shall authorize the
"giving of interest upon interest; or
"(b) shall apply in relation to any
"debt upon which interest is payable
"as of right whether by virtue of
"any agreement or otherwise. . . ."

"(2) Sections twenty-eight and
"twenty-nine of the Civil Procedure
"Act, 1833, shall cease to have
"effect."

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pound by three dividends, the first of 10s. in the pound on April 28, 1952, the second of 2s. 6d. in the pound on April 22, 1953, and the third of 7s. 6d. in the pound on July 24, 1954.

Certain of the shareholders requested the liquidator to seek the directions of the court before paying interest to the creditors on the amounts of their respective proofs from the date of the commencement of the winding up to the date of payment.

There were 83 unsecured creditors of the company whose debts totalled £16,064 6s. 8d. The only creditor who was, to the knowledge of the liquidator, entitled to prove for interest was the respondent, Benett & Sons and Shears Ltd., who recovered judgment against the company on November 10, 1950, for the sum of £1,518 4s. and £13 costs.

The liquidator deposed in his affidavit that if the action to set aside the debenture had not been successful there would have been a deficiency as regards the unsecured creditors of the company. The amount recovered in that action was approximately £22,000, so that if it had not been successful the assets in the hands of the liquidator would have been £22,000 less, and further reduced by the costs of both parties to the action.

The liquidator having been advised that the question whether or not interest should be paid on the said debts was not beyond doubt, this summons was issued for determination, inter alia, of the question whether interest was payable out of the surplus assets of the company remaining after payment of 20s. in the pound and the amounts which had been admitted to proof (a) on the amounts admitted to proof in respect of creditors who were entitled to prove for interest on their debts; (b) on the amounts admitted to proof in respect of creditors who were not entitled to prove for interest on their debts.

C. A. Settle for the liquidator.

Philip Sykes for the judgment creditor. A judgment creditor is entitled to interest on his judgment debt at the rate of four per cent. per annum: section 17 of the Judgments Act, 1838. If the company is, or ultimately turns out to be, solvent, interest is payable, upon any debts which carry interest, out of surplus assets remaining after payment of principal and interest up to the date of the winding-up order: *In re Humber Ironworks and Shipbuilding Co., Warrant Finance Co.'s Case*.² Accordingly, the judgment creditor is entitled to interest on the judgment

² (1869) L.R. 4 Ch. 643.

debt at the rate of four per cent. from the date of the presentation of the petition until the date of payment. [Reference was also made to *In re The Agricultural Wholesale Society Ltd.*³]

Allan Heyman for the simple contract creditors. These creditors are entitled to interest on their debts from the date of the winding-up order until the date of payment. The claim is put forward on two grounds. First, the court has a discretion to award interest "in any proceedings . . . for the recovery of "any debt or damages" pursuant to the provisions of section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. The powers of the court in this respect are wider than those contained in sections 28 and 29 of the Civil Procedure Act, 1833 (repealed by section 3 of the Act of 1934): see the note in Halsbury's Statutes of England, 2nd ed., vol. 18, p. 526. If the proofs of the simple contract creditors had been rejected by the liquidator and they had applied to the court for an order that their proofs be allowed, there is no doubt that the court would have power to admit them and to award interest thereon under section 3 of the Act of 1934. The creditors should not be placed in a worse position by virtue of the circumstance that the liquidator has admitted their proofs.

Alternatively, the company must be deemed to be an insolvent company (albeit that the liquidator is now possessed of substantial surplus assets) since this summons was taken out in the course of the winding up, which was granted on the footing that the company was insolvent. Accordingly, by virtue of section 317 of the Companies Act, 1948, section 33 (8) of the Bankruptcy Act, 1914, applies, which provides: "If there is "any surplus after payment of the foregoing debts, it shall be "applied in payment of interest from the date of the receiving "order at the rate of four pounds per centum per annum on all "debts proved in the bankruptcy." Therefore, unless and until it is shown that this company is not insolvent all the relevant bankruptcy rules apply, with the consequence that interest accrues and is payable on simple contract debts under section 33 (8) of the Act of 1914. [Reference was also made to Stiebel's Company Law and Precedents, 3rd ed., vol. 2, p. 1092; Buckley on the Companies Act, 12th ed., p. 631; *In re Hatfield Cask Co. Ltd.*⁴; *In re Albert Life Assurance Arbitration*⁵; *Fryer v. Ewart*⁶; and *In re Milan Tramways Co.*⁷]

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³ [1929] 2 Ch. 261, 264.

⁶ [1902] A.C. 187, 192.

⁴ (1863) 11 W.R. 971.

⁷ (1884) 25 Ch.D. 587.

⁵ (1872) 16 S.J. 517, 518.

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Richard Hunt for the contributories. The 26th rule of the General Order, November, 1862, provided for payment of interest on debts of this nature; but that rule was held to be *ultra vires*. It is suggested that interest is now payable on such debts of a company by virtue of section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934; but none of the leading textbooks on company law suggest that the section applies. Proceedings in the winding up of a company may be for the purpose of establishing a claim, but they are not "proceedings in" a "court of record for the recovery of any debt or damages" within the meaning of section 3. The section is inconsistent with the scheme of the Companies Act and the Winding Up Rules, and proceedings such as the present are not within its contemplation.

For the purposes of dealing with any surplus assets this must be treated as a company which is, and always was, a solvent company. Accordingly, section 317 of the Companies Act has no application and there is, consequently, no room for the application of the rules in bankruptcy. In any event, section 33 (8) of the Bankruptcy Act, 1914, does not apply to a limited company. [Reference was also made to Stiebel's Company Law and Precedents, 3rd ed., vol. 2, p. 1092; Palmer's Company Precedents (Part 2), Winding Up, 16th ed., p. 401; *In re Whitaker*.⁸]

VAISEY J. This is a curious point which cannot often have arisen and is not likely to arise with any frequency hereafter. The strange feature of the case is that a company in the process of being wound up on the footing that it was an insolvent company now finds itself in the position, in the person of its liquidator, of being in possession of a substantial surplus.

The question which arises may be summarized thus: Are the creditors of the company entitled to interest on their debts or not? Only one creditor was a judgment creditor, and there can be no doubt in my mind that that particular creditor is entitled to interest under his judgment. I shall make a declaration in his case that he was and is entitled to interest as from the date of the commencement of the winding up. In strictness, he might have been entitled to interest from the date of his judgment, which was some ten days earlier, but that has not been claimed and no further mention need be made of it.

⁸ [1904] 1 Ch. 299.

The difficulty is as regards the ordinary creditors, whose debts do not carry interest under the rights which accrued to them by virtue of their debts. The point may be thus formulated. Is there anything in the relevant statutes or in the general jurisdiction of the court which either entitles those creditors to interest or enables the court to give them interest as a matter of bounty or equity, in the due process of carrying out the liquidation of this company's affairs?

The Law Reform (Miscellaneous Provisions) Act, 1934, cannot apply to this case, because, in my judgment, this is not a proceeding "for the recovery of any debt or damages," those being the words in section 3 of the Act. The Act of 1934 declared that sections 28 and 29 of the Civil Procedure Act, 1833, should cease to have effect. In the note which appears in Halsbury's Statutes, 2nd ed., vol. 18, at p. 526, it is suggested that those repealed sections were more limited in scope than the new section which replaced them, namely, section 3 of the Act of 1934. The note states: "The court had, however,"—that is to say, had under the Act of 1833—"no general power, such as is conferred by the present section"—that is, section 3 of the Act of 1934—"to award interest on debts and damages." Speaking for myself, I think that that note is misleading. I think that the scope of section 3 of the Act of 1934 is not wider but narrower than the replaced sections of the Act of 1833. On the ground that this is not a proceeding for the recovery of any debt or damages, whether one regards the winding-up proceeding as a whole or whether one takes it as a step in the winding-up proceeding, I do not think it can be brought within the words "proceedings for the recovery of any debt."

The next point which is taken is this: under section 317 of the Companies Act, 1948, it is provided: "In the winding up of an insolvent company . . . the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable . . . as are in force for the time being under the law of bankruptcy in England with respect to the estates of persons adjudged bankrupt. . . ."

It has been argued, and argued with some force, that the company with which I am now concerned must be treated as having been an insolvent company by reason of the proceedings which began with the presentation of the petition and continued with the order to wind it up. Those proceedings have gone on, and must be deemed to be founded upon the assumption that it was an insolvent company. It is suggested that because it must be

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treated as having been an insolvent company, section 317 of the Companies Act, 1948, applies, and consequently that section 33 (8) of the Bankruptcy Act, 1914, which is in these terms, applies: "If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

This is a highly technical matter, and I am bound to say that I have approached it with considerable hesitation, and I decide it with considerable doubt. But it seems to me that section 33 (8) of the Bankruptcy Act, 1914, can only come into operation in the event of there being a surplus upon which that direction can act. Although for some purposes during the winding-up proceedings this company must have been deemed to have been insolvent, it seems to me that when the time comes for dealing with the surplus it must no longer be deemed to be an insolvent company, but has to be treated as a company which is, and was, and always has been, solvent. I agree that that is a curious conclusion to reach, because one would have thought that the payment of interest on debts was something which would only operate where there was a surplus to which the subsection applied. But one only gets the incorporation of that section as a result of the opening words of section 317 of the Companies Act, 1948, which begins, as I have already indicated, with the words: "In the winding up of an insolvent company." But I should have thought that as soon as it is found that there is a surplus, that the court must be deemed to be no longer winding up an insolvent company, but to be winding up a company which is solvent. The effect of that seems to be that the creditors other than the first respondent, who was a secured judgment creditor, are really seeking to put themselves in the position, or are asking the court to put them in the position, of secured creditors or judgment creditors entitled to interest. It would be a very strange result if I gave effect to the arguments which have been put forward on behalf of those creditors, and were to hold that they had brought themselves into exactly the same position as if they were judgment creditors entitled to interest. I feel very reluctant to bring about such a result as a consequence of the arguments which have been addressed to me. In my view the creditor whose right rests upon his judgment is and must be entitled to interest, but the ordinary creditors, that is to say, the creditors other than the judgment creditor, ought to come in and prove their debts without any claim to interest.

In this connexion I will read a passage from the judgment of Giffard L.J. in *In re Humber Ironworks and Shipbuilding Company*,¹ where he said: "For these reasons I am of opinion that dividends ought to be paid on the debts as they stand at the date of the winding-up; for when the estate is insolvent this rule distributes the assets in the fairest way; and where the estate is solvent, it works with equal fairness, because, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under his contract; and, on the other hand, a creditor who has not stipulated for interest does not get it. I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest."

I rather hoped that I should find in the present case that I had a discretion, and that, applying equitable principles to the winding up of this company, I should be in a position to award some interest, not necessarily at any particular rate, to the creditors whose rights are now in question, who have stood by and allowed an action to be brought for the benefit of the shareholders, the contributories, and thereby were kept out of their money for some time. I should have been very much disposed, if I had a discretion in the matter, to allow those creditors interest, at least from the date of the winding-up order, down to the time when the company was finally proved and established as a solvent company. But I cannot discover any case or any section of the Act which enables me to hold, as a matter of equity, justice or fairness, that these creditors should be put, either in regard to the whole period from the winding up to the date of payment, or in regard to some part of that period, in the same position as if they were judgment creditors. After all, persons who give credit to companies must expect, as a general rule, if the debtor company turns out to be solvent, that they will be paid the amount of their debts.

Accordingly, I must declare, subject to the form of order, that the first respondent, the judgment creditor, is entitled to receive and be paid the principal amount of its debt with interest at 4 per cent. from the date of the winding up; and I must hold that the other creditors who did not recover judgment must be treated as creditors of a solvent company not restricted to interest.

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¹ (1869) L.R. 4 Ch. 643, 647.

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Mr. Hunt, who appeared for the contributories, is made a respondent on this summons in a representative capacity, and I think that he was fully justified in arguing the case quite apart from any considerations of fairness or equity, or anything of that kind. If I have no discretion, as, to my regret I feel bound to hold, he has certainly no right or obligation to give away anything which rightfully belongs to the class of persons whom he represents.

If this had been a matter which arose with any frequency, I would have reserved my judgment and dealt with it in a more detailed manner, but in the circumstances I think that the parties will wish to know my conclusion and be less interested in the processes by which I have arrived at it than they are in the conclusion itself.

Declaration accordingly.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; E. F. Turner & Sons; W. R. J. Hickman & Randall.*

J. A. G.

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Dec. 2.

Danckwerts J.

In re HANBEY'S WILL TRUSTS.
CUTLERS' COMPANY *v.* PRESIDENT AND GOVERNORS
OF CHRIST'S HOSPITAL, LONDON.

[1955 H. 1480.]

Charity—Scheme—Forfeiture clause—Gift over from one charity to another—Impossibility of complying strictly with terms of original trust—Application for a scheme—Delay in bringing application—Power of court to direct a scheme—Whether discretionary—Effect of scheme upon the gift over.

The testator, who died on December 25, 1786, by his will dated January 12, 1782, bequeathed the sum of £8,000 to the Cutlers' Company [of Sheffield] upon trust to apply the annual income thereof in perpetuity for divers charitable purposes set out with great particularity, with a gift over in favour of Christ's Hospital in the event of the company at any time failing to distribute the income of the trust fund in the manner and according to the directions prescribed by the will.

Since the year 1917 the company had found itself no longer able to comply strictly with the terms of the bequest in respect of the mode of the annual distribution of the fund.

In 1955 the company issued a summons to determine, inter alia, the question whether the gift over had or had not taken effect, and the court treated the summons as though it were amended to include a request for a settlement of a scheme to preserve the original trusts in an amended form:—

Held, (1) that the court had power to direct a scheme continuing the original trusts in a different form;

(2) that the effect of such a scheme, if directed, would be to defeat the gift over;

(3) that the court had a discretion as to whether or not a scheme should be directed;

(4) that in the exercise of this discretion and taking into consideration all the circumstances of the present application—in particular, the fact that the company had been committing breaches of trust (albeit in good faith) for a considerable period of time without the authority of the court or of any other body with jurisdiction over charities, and the fact that it would be difficult to settle a scheme which would apply the property cy-près with the testator's objects—the court was of opinion that this was not a case in which a scheme ought to be directed, and that, accordingly, the gift over took effect.

In re Richardson's Will (1888) 58 L.T. 45; *In re The Trustees of Orchard Street Schools* [1878] W.N. 211; *In the Matter of the Parish of Upton Warren* (1833) 1 My. & K. 410; *Christ's Hospital v. Grainger* (1849) 1 Mac. & G. 460 considered.

ADJOURNED SUMMONS.

The testator, Thomas Hanbey, who died on December 25, 1786, by his will dated January 12, 1782, after a number of bequests and after referring to a sum of £10,000 deposited in bank annuities which he directed to be held upon trust to pay the annual dividends and profits to his wife, Mary Hanbey, directed that: “from and immediately after the decease of my
“said dear wife Mary Hanbey and due payment of all arrears
“of the said dividend up to the day of her death upon trust, to
“assign and transfer the sum of £8,000 part of the said sum of
“£10,000 bank annuities unto the Master, Wardens, Searchers,
“Assistants and Commonalty of the said Company of Cutlers,
“of Hallamshire in the County of York [the plaintiffs], for the
“time being and their successors upon the trusts and for the
“purposes hereinafter mentioned (that is to say) upon Trust that
“[the plaintiffs] and their successors for the time being shall
“and do at or upon the twenty-ninth day of June being my
“birth day yearly and every year for ever pay apply lay out
“and dispose of the clear yearly dividends and proceeds of the
“sum of £5,000 part of the said sum of £8,000 bank annuities
“to and for the benefit of as many poor house keepers . . .

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“ living and residing in the said parish of Sheffield being members
 “ of the Church of England of a sober life and conversation, and
 “ each of them of the age of fifty years or upwards, whereof
 “ I will that two thirds shall be men, and one third women
 “ as such yearly dividends will extend to relieve yearly, with
 “ one great blue cloth coat, and one black hat and 20s. in money
 “ to each such poor man; and with one blue cloth coat, and one
 “ black hat and 20s. in money to each such poor woman. And
 “ I will, that the said poor men and poor women shall be
 “ annually named, and appointed to receive the said charity by
 “ the persons following (that is to say) the Master and two
 “ Wardens for the time being and all those that have served the
 “ office of Master of the said Company of Cutlers and by the
 “ said Twelve Burgesses for the time being (commonly called
 “ Church Burgesses) of the said town of Sheffield, and by the
 “ Vicar and Church-wardens for the time being of the Old Parish
 “ Church of Sheffield aforesaid, or by the greater part of them
 “ present at a meeting to be had every year for that purpose,
 “ and that at every such yearly distribution of the said charity,
 “ such of my kindred as shall apply for the same, and shall be
 “ qualified as aforesaid, shall always have the preference to all
 “ others—And upon further Trust, that they [the plaintiffs] and
 “ their successors for the time being, shall and do yearly and
 “ every year for ever, pay apply lay out and dispose of the
 “ yearly sum of £16 10s. part of the clear yearly dividends and
 “ proceeds of the sum of £3,000 (residue of the said sum of
 “ £8,000 bank annuities) unto the persons and for the purposes
 “ hereinafter mentioned (that is to say) the sum of £10 part
 “ thereof, yearly for ever, unto the Master for the time being
 “ of the Charity School of Sheffield finished in the year of Our
 “ Lord 1710, wherein 28 Blue Coat Boys and 3 Green Coat Boys
 “ are now maintained and educated for his care and trouble in
 “ teaching and educating the poor children hereinafter provided
 “ for by me, in the said school over and above and in addition
 “ to his yearly salary and the sum of 20s. other part thereof
 “ yearly for ever to the Vicar or Minister that shall preach the
 “ sermon hereinafter by me directed and the sum of 10s. other
 “ part thereof unto the Clerk and Sextons of the said Parish
 “ Church for their attendance at such sermon to be divided
 “ amongst the said clerk and sextons in such proportions as my
 “ said trustees then present shall think fit and the sum of £5
 “ remainder thereof for ever for a dinner for my said trustees
 “ after their return from church and subject to the said yearly

" charge of £16 10s. Upon further Trust that they [the
 " plaintiffs] and their successors for the time being shall and
 " do yearly and every year for ever pay apply lay out and dispose
 " of all the rest residue and remainder of the clear yearly divi-
 " dends and proceeds of the said sum of £3,000 bank annuities
 " into and for the maintaining and educating in the Charity
 " School of Sheffield aforesaid, finished in the said year of our
 " Lord 1710 of as many more children (either boys or girls or
 " both) of poor house keepers living and residing or if dead who
 " did live and reside in the said parish of Sheffield being or
 " when alive having been members of the Church of England
 " and in the annually clothing of such children as the said
 " residue of the said yearly dividends and proceeds will extend
 " to maintain educate and cloathe until they shall be fit to be
 " placed out as apprentices or servants And my will and
 " meaning is that all the said poor children shall from time to
 " time for ever as often as occasion shall require be nominated
 " and appointed to the said charity by the Master, and two
 " Wardens for the time being and all those that have served
 " the office of Master of the said Company of Cutlers, and by
 " the said Twelve Burgesses for the time being (commonly called
 " Church Burgesses) of the said town of Sheffield, and by the
 " Vicar and Churchwardens for the time being of the Old Parish
 " Church of Sheffield aforesaid or by the major part of them
 " present at a meeting to be had for that purpose from time to
 " time and that the children of such poor house keepers as shall
 " be of my kindred, and shall apply for the same, and shall be
 " qualified as aforesaid shall have the preference over all others
 " And that the said poor children shall be maintained, lodged,
 " and kept in the said charity school and shall be taught and
 " instructed to read and write English and also common
 " arithmetic and shall at or upon the said twenty-ninth day of
 " June, yearly and in every year for ever be clothed in a blue
 " uniform in the same manner as the poor children in Christ's
 " Hospital, London, are clothed And my further will is, that
 " the said Master and two Wardens for the time being, and all
 " those that have served the office of Master of the said Com-
 " pany of Cutlers, and the said Twelve Burgesses for the time
 " being . . . or the major part of them shall yearly and every
 " year for ever and at or upon the said twenty-ninth day of
 " June, at nine of the clock in the forenoon meet in the said
 " charity school, or in such other convenient place in the said
 " town of Sheffield, as they shall from time to time think fit,

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“ to supervise and see all the clear yearly dividends and proceeds
 “ of the said several sums of five thousand pounds, and three
 “ thousand pounds bank annuities, be from time to time respec-
 “ tively paid applied laid out and disposed of, according to the
 “ true intent and meaning of this will; and that then and so
 “ often at every such meeting all the said poor house keepers,
 “ and poor children, shall go in procession in their new clothing
 “ before my said trustees, to the Old Parish Church of Sheffield
 “ aforesaid and there hear a sermon preached in the forenoon by
 “ the Vicar of the said Parish, for the time being or by such
 “ other minister as my said trustees shall for that purpose appoint
 “ and that they my said trustees shall return from church and
 “ dine together in such convenient place in the said town of
 “ Sheffield, as they shall from time to time think fit. . . . Pro-
 “ VIDED ALWAYS and my express will and meaning is that in case
 “ [the plaintiffs] and their successors for the time being shall
 “ not within the space of three calendar months next after the
 “ decease of my said dear wife Mary Hanbey accept take and
 “ receive the said sum of eight thousand pounds bank annuities
 “ upon the trusts and for the purposes aforesaid or in case it
 “ shall happen that after they have so taken accepted and
 “ received the same that all or any part of the clear yearly
 “ dividends and proceeds thereof shall not from time to time be
 “ paid applied laid out and disposed of in pursuance of and
 “ according to the directions hereinbefore by me willed and given
 “ of and concerning the same Then and from thenceforth (in
 “ either of the said cases which shall first happen) the said sum
 “ of eight thousand pounds bank annuities shall absolutely vest
 “ in and become the property of the said President and Governors
 “ of Christ’s Hospital London for the time being and their suc-
 “ cessors for the benefit of the said Hospital and the right and
 “ interest of [the plaintiffs] and their successors in the said sum
 “ of eight thousand pounds bank annuities and the several
 “ charitable uses aforesaid shall from thenceforth cease and be
 “ utterly void and I do hereby declare it to be my further will
 “ and meaning that they the said John Tappenden and James
 “ Mitchell and the survivor of them and the executors and
 “ administrators of such survivor shall and do from and immedi-
 “ ately after the decease of my said dear wife Mary Hanbey
 “ and payment of all arrears of interest up to her death assign
 “ transfer and make over the sum of two thousand pounds bank
 “ annuities residue of the said sum of two thousand pounds like

“annuities unto the President and Governors of Christ’s
“Hospital London for the time being.”

After the death of the testator’s wife, which happened on January 15, 1797, the plaintiffs accepted the trusts in his will declared and contained of and concerning the £8,000 bank annuities and such fund was now represented by £9,871 3½ per cent. Conversion Stock, which was acquired in 1922, and produced a gross income of £342 6s. 8d. per annum.

The charity school referred to in the will was formerly in the middle of Sheffield, close to the parish church which is now the cathedral. In 1911 the school moved to a new site with more suitable amenities in another part of Sheffield and took the name “The Sheffield Blue Coat School.” In 1926 the distinctive mode of dress worn by the boys was abandoned in favour of ordinary clothing. On September 12, 1939, the school and playground were requisitioned by the War Office and remained requisitioned until April 20, 1946. On August 26, 1946, the school buildings and playground were requisitioned by the Ministry of Education for use by the Sheffield Corporation as the local education authority for school purposes in the neighbourhood, and the original charitable foundation as such had now no separate existence. The school was now the subject of a scheme made by the Minister of Education which was sealed on March 23, 1954.

In the circumstances the plaintiffs had received no application for educational assistance since 1939. Until 1939, and the records showed for more than the last 100 years, the payments mentioned in the will to the master, the preacher, the clerk and the plaintiffs were regularly made, namely, one guinea to the beadle of the plaintiffs, five guineas for administration expenses, and £69 15s. for maintenance of six boys at the school. Since 1939 (save during the war) the following payments had been made out of income, namely, one pound to the preacher, ten shillings to the verger, one guinea to the beadle, five pounds towards the expenses of the dinner, and five guineas for administration expenses. As regards the disposition of income among “poor house keepers,” in 1917, owing to the difficulty of getting the coats and hats mentioned in the will except at prohibitive cost, the trustees ceased to issue them and increased the cash gift to two pounds. In 1924 and thereafter female applicants for assistance had so outnumbered male applicants that it had not been possible strictly to keep to the terms of the will as to the proportion of two men to one woman.

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In the events which had happened and, in particular, having regard to the changed circumstances of the school referred to in the will, the plaintiffs had been advised to seek the directions of the court. Accordingly, the present summons was taken out for determination, *inter alia*, of the questions (a) whether on the true construction of the testator's will and the events which had happened the gift over to the first defendants of the capital of the charitable bequest of £8,000 consolidated bank annuities had or had not taken effect, and whether the plaintiffs now held the trust fund in trust in whole or in part for the first defendants absolutely; (b) generally that it might be determined upon what trust and for what purposes the said trust fund was now held by the plaintiffs.

T. A. C. Burgess for the plaintiffs. It is admitted that the plaintiffs have not complied strictly with the terms of the bequest, but their negligence or default is not of such a character as to bring the gift over into effect: see Halsbury's Laws of England, 3rd ed., vol. 4, para. 610 (p. 295). It would be proper in the circumstances for the court to authorise the settlement of a scheme to preserve the original trusts in an amended form, albeit that the making of a scheme might have the effect of defeating the gift over: reliance is placed on *In re Richardson's Will*,¹ *In re The Trustees of Orchard Street Schools*² and *In the Matter of the Parish of Upton Warren*.³ It is true that in *Christ's Hospital v. Grainger*⁴ the gift over took effect, but that decision is distinguishable, for there the trustees misemployed the trust property and not, as in the present case, merely misapplied the income of the trust funds.

Nigel Warren for the first defendants. The clause in question contains a condition precedent and a condition subsequent accompanied by a gift over. It is the effect of the latter condition which falls for consideration in the present case. For a statement of the general principles involved in this class of case, see Tudor on Charities, 5th ed., pp. 78 et seq.

It is plain that owing to non-compliance by the plaintiffs with the terms of the bequest the gift over has taken effect. In those circumstances it would be very difficult for the court to direct a scheme in favour of the plaintiffs, for if the gift over has taken effect the trust fund is already vested in interest in the first defendants.

¹ (1888) 58 L.T. 45.

² [1878] W.N. 211.

³ (1833) 1 My. & K. 410.

⁴ (1849) 1 Mac. & G. 460.

It is submitted that the court has no power to direct a scheme where the testator has provided, by means of a gift over, what is to happen on failure of the primary trust. In the alternative, if it be held that the court has power in such circumstances to direct a scheme, the court in the exercise of its discretion ought not to direct a scheme in the present case because of the delay of the plaintiffs in applying to the court for directions, there having been admittedly breaches of trust committed by them since 1917.

In re Richardson's Will,⁵ *In re The Trustees of Orchard Street School*⁶ and *In the Matter of the Parish of Upton Warren*⁷ are not satisfactory decisions in that it is difficult to discover on what principles the court in those cases made the schemes in question. Reliance is placed on *Christ's Hospital v. Grainger*⁸ as being the most satisfactory decision in support of the contentions put forward above. [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 4, pp. 298, 299; *Attorney-General v. Christ's Hospital*⁹; *Andrews v. McGuffog*¹⁰; *Royal College of Surgeons of England v. National Provincial Bank*¹¹; *In re Faraker*.¹²]

B. J. H. Clauson (*Denys Buckley* with him) for the Attorney-General. This summons raising, as it does, an issue between two charities, the Attorney-General wishes to maintain a neutral attitude.

[DANCKWERTS J. Has the court a discretion whether or not to direct a scheme in circumstances of this kind?]

It is submitted that the court has a discretion. It is to be observed (1) that a scheme is normally made to prevent the gift from leaving the ambit of charity; (2) that the effect of making a scheme is permanently to thwart the gift over.

DANCKWERTS J. The question which I have to decide is in regard to a bequest of £8,000 contained in a will which was made as long ago as January 12, 1782. [His Lordship referred to the terms of the will, the inability of the trustees to carry out strictly the terms of the bequest, and to the fact that a scheme had been made in respect of the charity school, and continued:]

That scheme, which has been exhibited, shows that the funds which were available for the carrying on of that school for, as

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⁵ 58 L.T. 45.⁶ [1878] W.N. 211.⁷ 1 My. & K. 410.⁸ 1 Mac. & G. 460, 463.⁹ (1830) 1 Russ. & My. 626.¹⁰ (1886) 11 App.Cas. 313, 329.¹¹ [1952] A.C. 631, 633, 648.¹² [1912] 2 Ch. 488.

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it appears, elementary education have been diverted by the scheme of the Ministry of Education to purposes which are more in the nature of higher education. As stated in clause 11 of the scheme, they are to be applied, "in any of the following ways "for the benefit of children resident in or near the City of "Sheffield, who, in the opinion of the trustees, are in need of "financial assistance:—(a) Exhibitions tenable at any secondary "school, training college for teachers, university, or other institu- "tion of further (including professional and technical) education, "approved by the trustees, to be awarded under rules to be "made by the trustees, including rules as to the value and period "of tenure of the exhibitions, and the qualifications, and method "of ascertainment and selection, of candidates; (b) Financial "assistance, outfits, clothing, tools, instruments or books to "enable beneficiaries on leaving school, university, or any other "educational establishment, to prepare for, or to assist their "entry into, a profession, trade or calling; (c) In otherwise "promoting the education (including social and physical train- "ing) of beneficiaries."

It is plain that for some considerable period of time the directions of the testator in regard to the sums of £5,000 and £3,000 have not been carried out in accordance with the terms of the will. Therefore, *prima facie*, it would appear that the gift over would have taken effect. As regards the question of the school to which the poor scholars were to go, any breach of trust in that connexion was not really the fault of the trustees, because the requisitioning of the site by the War Office in the first instance, and, secondly, by the Ministry of Education, diverted the school from the purposes for which it was intended to be used against the wishes of the persons who were concerned in the matter. But until now the trustees have made no attempt to obtain any directions or a scheme from the court. Indeed, the summons as taken out does not ask for a scheme, but should that become necessary I am asked to treat it as though the summons has been amended so as to include a request for a settlement of a scheme by the court, and I propose, therefore, to give leave to amend the summons to include what was intended to be asked for.

The argument proceeded on these lines. The persons representing Christ's Hospital claim that the gift over has taken effect and that the whole amount of the legacy should be paid over to Christ's Hospital for the purposes of the school. On the other hand, it was contended by the trustees that the court

should make a scheme which will have the effect of preserving the original charities designated by the testator and therefore the gift over will not take effect, and, so far as one can see, will never take effect in those circumstances.

It is no doubt true that if the court makes a scheme for the purposes of the administration of a charitable trust, that charitable trust is not destroyed but continues. It is merely the same trust continuing in a manner altered in due accordance with law: see *In re Faraker*.¹

But there remains a doubt whether the court has power to direct a scheme so as to defeat the gift over, and, secondly, if the court has power to make a scheme, whether in all the circumstances of the case the court should exercise that power in the present case. The authorities on this question are by no means clear. *In re Richardson's Will*,² *In re the Trustees of Orchard Street Schools*,³ and *In the Matter of the Parish of Upton Warren*⁴ are cases in which schemes have been made which undoubtedly did have the effect of preserving the original trust which had been neglected by the trustees and which did defeat any gift over for charitable purposes contained in the wills in those cases.

I was referred to a passage in Halsbury's Laws of England, 3rd ed., vol. 4, para. 610 (p. 295), where it is stated that the negligence or default of a trustee is not sufficient to nullify a charitable purpose, whether there is or is not a gift over, unless the testator expressly makes the gift over depend upon the conduct of the trustee.

On the other hand, in *Christ's Hospital v. Grainger*⁵ it does appear that no scheme was made although there was apparently another suit pending by the Attorney-General for the settlement of a scheme in such a way as to defeat the gift over. In that case the facts were that⁶: "The Corporation of London, as "Governors of Christ's Hospital, by the bill claimed certain "property which had been left by the testator, John Hendricke, "in 1624, to the Corporation of Reading, for certain charitable "purposes in that town, with a direction that if the donees "should for a year neglect, omit, or fail to perform the directions "of his will, such gift should be utterly void, and should forth- "with be paid and transferred to the Corporation of London "for the benefit of Christ's Hospital." The question on which

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¹ [1912] 2 Ch. 488.

² (1888) 58 L.T. 45.

³ [1878] W.N. 211.

⁴ (1833) 1 My. & K. 410.

⁵ (1849) 1 Mac. & G. 460.

⁶ Ibid. 461.

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that case is generally cited is on the point whether a gift over of that kind is obnoxious to the rule against perpetuities. But there is no doubt that in the result the effect of the decision was that the gift over came into effect with the consequence that the bequest went over to Christ's Hospital.

I find it a little difficult to see what is the distinction as regards the cases where the default of the trustees to apply property in accordance with the testator's direction is none the less not allowed to defeat the gift, and the cases in which the default of the trustees does have the result of defeating the gift and results in the gift over taking effect. It seems to me practically impossible to discover what is the dividing line.

None of the cases to which I have already referred can be regarded as very satisfactory authority on the question, because the real point which I have to consider today does not appear to have been argued in any of those cases—at any rate, it does not appear to have been really present to the minds of the courts.

In the later case of *In re Randell*⁷ there was a gift to the charity named in the first instance for a limited period only; and on the conclusion of that period the charitable gift came to an end. However, it seems to me plain that in the present case the charitable gift is perpetual subject to the effect of the forfeiture clause or the gift over; the trustees are directed to carry out certain specified duties in connexion with the trust yearly and in every year for ever, so that it is quite plain that it was intended in the first instance to be a perpetual charitable gift.

In those circumstances four questions arise: First, has the court power to direct a scheme? It seems to me that the court has power to direct a scheme. Secondly, if the court does direct a scheme, will that scheme, continuing the original trusts in a different form, have the effect of defeating the gift over? It seems to me that the answer to that must also be in the affirmative, that is to say, that such a scheme will defeat the gift over because the original trust will continue although it will be in an altered form which is authorized by law. The third question is, is the court bound to direct a scheme in circumstances of this kind? Lastly, in the present circumstances, should I direct the settlement of a scheme and, if so, should I then refer the matter to chambers for that purpose?

It was not really contended that the court was absolutely bound to direct a scheme. It seems to me that the court must have discretion in the matter whether a scheme must be directed

⁷ (1888) 38 Ch.D. 213; 4 T.L.R. 307.

in the circumstances or not. Having regard to all the circumstances of this case, it seems to me it is not a case in which I should direct a scheme. The considerations which affect me in that regard are these: first, it is plain that unless a scheme is directed, the vesting of the sum of £8,000 under the trusts of the will in Christ's Hospital has already taken place—it took place some time ago. The trustees have clearly been committing breaches of trust—no doubt in perfect good faith—without the authority of the court or of any other body which has power to authorize what they have been doing. Further, it seems to me that if I defeat the forfeiture clause or the gift over in the present case I shall really be defeating what appears to be the intention of the testator.

Another consideration is this: it seems that the trusts which the testator had in mind in his first alternative—if I may term it such—in his will, are ones which are now defeated and it would be difficult to settle any useful scheme which would really apply the trust property *cy-près* with the objects that the testator had in mind in his will. In all the circumstances I come to the conclusion that this is not a case in which I should direct the settlement of a scheme. It seems to me plain, therefore, that the gift over in favour of Christ's Hospital has taken effect and that Christ's Hospital are entitled to the funds in question.

Declaration accordingly.

Solicitors: *Peacock & Goddard for Younge, Wilson & Co., Sheffield; Beachcroft & Co.; Treasury Solicitor.*

J. A. G.

MILNER v. STAFFORDSHIRE CONGREGATIONAL
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[1955 M. 79.]

Charity—Sale of trust property—Consent—"Sale"—Contract for sale by trustees of part of charity estate—Consent of Charity Commissioners not obtained—Repudiation of contract by purchaser—Whether sale made by contract or conveyance—Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

"Sale."

A purchaser entered into a written agreement with the trustees of an incorporated charity for the purchase of a house, and paid a deposit of £250. The purchaser, considering that he was not bound by the contract, as it had not previously been approved by the

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Charity Commissioners (in accordance with the provisions of section 29 of the Charitable Trusts Amendment Act, 1855), and not wishing to proceed with the purchase, repudiated the contract and claimed the return of his deposit:—

Held, that, for the purposes of the section, a sale is made when a contract is entered into by the owners of the property for the sale of the property to a purchaser; and that, since it was a breach of the section for a body of charitable trustees to enter into a contract to sell trust property without the authority of the Charity Commissioners, the present contract was not lawful and was not binding on the purchaser, who was accordingly entitled to repudiate it and to recover his deposit.

Ellis v. Rogers (1884) 29 Ch.D. 661 and *Day v. Singleton* [1899] 2 Ch. 320 distinguished.

ACTION.

By an agreement in writing, dated September 11, 1954, and made between the Staffordshire Congregational Union (Incorporated) (hereinafter called “the defendants”) of the one part and Stuart Brandon Milner (hereinafter called “the plaintiff”) of the other part, the defendants purported to agree to sell and the plaintiff agreed to purchase a freehold messuage and premises at Wolverhampton at the price of £2,200. On or about September 11, 1954, the plaintiff paid a deposit of £250 in part payment of the said sum of £2,200. The property was, at the date of the agreement and at all other material times, vested in the defendants on charitable trusts.

At the date of the agreement the defendants had no such authority, scheme or approval as was mentioned in section 29 of the Charitable Trusts Amendment Act, 1855.¹

On October 16, 1954, the plaintiff repudiated the agreement and subsequently began this action in which he claimed the return of the deposit of £250, alleging that, in consequence of the infringement of section 29 of the Charitable Trusts Amendment Act, 1855, by the defendants, the sale was not lawful.

G. A. Grove for the plaintiff. The words “make any sale” mean “entering into the contract,” and the sale was therefore unlawful without the authority of the Charity Commissioners.

¹ Charitable Trusts Amendment Act, 1855, s. 29: “It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according

“to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years.”

Section 29 of the Act does not say "complete a conveyance," but "make . . . any sale," and it would, therefore, appear that a sale is made when the owner of the property enters into a contract for the sale of the property to a purchaser. There was here a contract to sell the property, and, there being no consent to the sale by the Charity Commissioners, the contract was unlawful and not binding on the plaintiff.

The purpose of the section was to protect the property of the church from the church's own trustees: see Tudor on Charities, 5th ed., p. 509. Sections 24 and 29 envisage that the Charity Commissioners shall not only determine the price, but may give other directions. [Reference was made to *In re Mason's Orphanage and London and North Western Railway Co.*²]

G. B. H. Dillon for the defendants. A sale is not made until the transaction is completed; it necessarily connotes the transfer of land. There are various judicial expressions in support of that view: *Rex v. Edwards*.³ There are two decisions which show that a sale required a transfer and conveyance: *Attorney-General v. Wyndham*⁴ and *John Foster & Sons Ltd. v. Commissioners of Inland Revenue*.⁵

"Making a sale" in section 29 of the Charitable Trusts Amendment Act, 1855, involves "transfer and alienation" of land, and does not mean merely entering into a contract to sell the property. If the court rejects this submission, it must necessarily upset the established practice of charities and charity trustees in disposing of their property. It is not disputed that, before the property is conveyed, the approval of the Charity Commissioners must be obtained, but it is not suggested that, in the contract, time was of the essence, and it is not suggested that anything was done to make time of the essence, before the consent of the Charity Commissioners was obtained. In this case the defendants did what was necessary as regards the consent, as they obtained it before a conveyance could be executed. It was at first thought that consent had to be obtained before contract, but that was disapproved of by the Court of Appeal: see *Ellis v. Rogers*⁶ and *Day v. Singleton*.⁷ In the case of a contract for the assignment of leaseholds it is enough for consent to be obtained by the time of the completion of the assignment.

Viewing the matter as one of conveyance and assignment,

² [1896] 1 Ch. 54, 61, 596; 12 T.L.R. 18, 236.

³ [1947] K.B. 392; [1947] 1 All E.R. 314.

⁴ (1862) 32 L.J.Ex. 1, 6.

⁵ [1894] 1 Q.B. 516, 527; 10 T.L.R. 152.

⁶ (1884) 29 Ch.D. 661.

⁷ [1899] 2 Ch. 320.

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permission for the sale must be obtained. Here the renewal of the consent of the Charity Commissioners has been obtained, and, on that basis, the defendants have a valid claim for specific performance. The true construction of the section is that a sale is not made until it is completely made, and the sale, therefore, takes place at completion and not earlier.

Grove in reply. No general meaning is to be attached to the word "sale," as necessarily taking place on conveyance. "Sale" can mean different things in different Acts and one must ascertain its meaning in the particular section.

DANCKWERTS J. The point raised in this action is one which does not appear to be covered by authority. It seems rather strange that it has not had to be decided at an earlier date, because it depends on the true interpretation of a section in an Act passed as long ago as 1855. The action is by an alleged purchaser to recover a deposit of £250, which he had paid in the circumstances which I shall mention, and there is a counterclaim for specific performance of the alleged contract.

On September 11, 1954, the plaintiff purported to enter into a contract for the purchase of a house, known as No. 4, Lonsdale Road, Wolverhampton, with the secretary of the defendants, who are an incorporated charity known as the "Staffordshire Congregational Union (Incorporated)." The contract was drawn up on a form apparently used by an estate agent, who obviously did not appreciate that there might be a question under the Charitable Trusts Amendment Act, 1855, as was discovered subsequently. The purchaser was expressed to be: "The purchaser of all that freehold messuage and premises together with the appurtenances thereto belonging and known as 4, Lonsdale Road, Wolverhampton, in the County of Stafford at a price of £2,200." Then it is provided that the purchaser agreed to pay the vendors' legal costs not exceeding £50. The contract, or the agreement, whatever it may be, was subject to the obtaining of a mortgage of £1,675, and recited that the plaintiff had paid a deposit of £250: "on the terms of the common form conditions of the Law Society so far as the same are applicable to a sale by private treaty and the vendor and the purchaser agree to complete the sale and purchase accordingly. The property is sold subject to any reservations as to mines, minerals, right of way, light, easements, and restrictive covenants (if any). The vendor shall deduce a good marketable title and the purchase shall be completed on or before October

"30, 1954, on which date vacant possession shall be given to "the purchaser." The price was expressed, as I said, to be £2,200; it appears to have been altered from some other figure, and there is a note in the corner "Mr. Milner"—that is the plaintiff—"authorized this on 'phone 15/9/54."

On September 24, 1954, the plaintiff's solicitors were informed by the defendants' solicitors that "the sale of the "property must be subject to the consent of the Charity "Commissioners, to whom we have already sent the usual "application." Whereupon the Charity Commissioners inserted an advertisement in a newspaper referring to the proposal by the charity to sell the property in question for £2,200 "the "purchaser paying all the trustees' expenses of the sale," which was not, in fact, as it seems to me, an accurate description of the terms of the contract. The obligation of the purchaser was to pay expenses up to £50, and the trustees' expenses might or might not exceed that figure. Then the advertisement continues: "Any higher offer, objection or suggestion which relates "to the proposed sale should be in writing, addressed to the "Secretary, Charity Commission," and so on, "and if delivered "at the office of the Commissioners on or before November 1, "1954, will be taken into consideration." On October 16, two letters were written, one to the defendants' solicitors and the other to the estate agent, declaring that the plaintiff, in view of the advertisement which he apparently had seen, did not feel he was bound by the contract, and did not wish to proceed with the purchase. Accordingly, it is claimed on behalf of the plaintiff that he has repudiated the sale, and that the matter is at an end.

On the other hand, as eventually a consent was obtained from the Charity Commissioners on November 12, 1954, in regard to the property, it is claimed on behalf of the defendants that there is a binding contract by the plaintiff to purchase the property for the sum of £2,200, subject to the question about the costs which were to be paid by the purchaser. The order of the Charity Commissioners is expressed in the following terms, as regards the material parts: "The body corporate "called The Staffordshire Congregational Union (Incorporated) "being the trustees of the charity may sell the said property for "£2,200 subject to the conditions that: (a) the sale shall be "completed within one year from the date of this order; (b) the "purchaser shall pay all the proper expenses of the trustees in "connexion with the sale." As I remarked in referring to the

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advertisement, the terms of the order do not seem to me to coincide exactly with the terms of the alleged contract; but there has been an admission for the purposes of the action that, for the purposes of the conditions, to which I have referred, made by the Charity Commissioners, the proper expenses of the defendants in connexion with the sale of the property would have been the vendors' solicitors scale costs, £40 10s. 0d., as the estate agent has not made any charge in respect of either his commission or his out-of-pocket expenses.

So it is contended that the limit of £50 which was imposed by the terms of the alleged contract has been satisfied. I should add that there has been a later order, dated December 9, 1955, repeating the same consent by the Charity Commissioners on account of the time which has passed since the original alleged contract was entered into and the original consent of the Charity Commissioners was given.

The matter seems to me to depend on the meaning and effect of section 29 of the Charitable Trusts Amendment Act, 1855. [His Lordship read the section and continued:] The material words for the purpose of the present case are: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make any sale otherwise than with the approval of the Board."

The question is: what is a sale, and when is it made? The power of the Charity Commissioners to give their consent to a sale is contained in section 24 of the Charitable Trusts Act, 1853, but I do not think anything turns on that section; it is simply the meaning of section 29 of the Act of 1855 which I have to ascertain. I have been referred to some cases on behalf of the defendants in which it is claimed that there are expressions used by the judges saying that a sale is not complete, and therefore there is no sale, until there has been a conveyance or transfer of the property. In *In re Mason's Orphanage and London and North Western Railway Co.*¹ (a decision which was affirmed by the Court of Appeal) there is an expression suggesting that alienation is the matter to which section 29 is directed. But the point which I have to decide was not under consideration by either Stirling J. or the Court of Appeal. The only question then was whether a power to sell contained in a deed or document creating a charity was a scheme legally established within the meaning of this section. Therefore it is not really of any help to me to find that this particular phrase was used by the judges in that case.

¹ [1896] 1 Ch. 54, 61, 596; 12 T.L.R. 18, 236.

In the same way, *Rex v. Edwards*² and *Attorney-General v. Wyndham*,³ in which there are expressions suggesting that a sale is not complete until the money is paid, or that a sale requires a conveyance, do not seem to me to carry the matter much further. They do not really shed any light on the meaning which is to be applied to the particular section of the Act with which I have to deal. Again, I have been referred to cases dealing with the assignment of leaseholds and contracts to assign leaseholds which are subject to a covenant against alienation: see *Ellis v. Rogers*⁴ and *Day v. Singleton*.⁵ In those cases it has been held, or at any rate suggested, that where on a sale of leaseholds the consent of the landlord is required, the matter of obtaining the consent is one of title which may be obtained at any time up to the date fixed, at any rate by the contract for completion, and that a purchaser is not at liberty to withdraw before that date, because at the time in question such consent has not been obtained. That seems to me purely a matter of contract; that is to say, the position between the landlord and his tenant is purely a matter of contract. There is an agreement binding between the landlord and his tenant that the tenant will not assign without the consent of the landlord, and if the tenant does so assign, he commits a breach of contract, and may be liable in damages. But what is more important is that it is only a question of damages unless the agreement in question is supported by the sanction of a condition of re-entry. It is the fact that the assignee is liable to be evicted by the landlord under the condition of re-entry which makes the title one which is not satisfactory unless and until the landlord's consent to assignment is obtained. Subject, however, to that, there is nothing unlawful, so far as I can see, in a tenant agreeing to assign the term to a purchaser; therefore it seems to be a very different question from that which arises in the present case owing to the provisions of section 29 of the Charitable Trusts Amendment Act, 1855.

I have to decide what that Act means when it says: "make a sale." It does not say "make a conveyance" or "complete a sale" or anything of that sort; it simply says "make any sale," and I think for the purposes of the section, though I am bound to say that the matter is not free from doubt, that a sale is made when a contract is entered into by the owners of the

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² [1947] K.B. 392; [1947] 1 All
E.R. 314.

³ (1862) 32 L.J.Ex. 1.

⁴ (1884) 29 Ch.D. 661.

⁵ [1899] 2 Ch. 320.

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property in question for the sale of the property to some purchaser. It is therefore a breach of the terms of the section if a body of charitable trustees enters into a contract to sell the trust property without the authority of the Charity Commissioners. I would observe that there is some support for this view to be found in the documents in the present case. In the alleged contract the phrase is: "The property is sold subject "to any reservations," and so on, and in the solicitors' letter of September 24, 1954, the expression is: "The sale of this "property must be subject to the consent of the Charity Com- "missioners." It is perhaps then not unreasonable to think that the word "sale" in the section must be used in a similar manner.

I am not saying, of course, that a conveyance in pursuance of the purported contract would be any more lawful than the original contract; but it seems to me that the word "sale" must include the making of a contract of sale at least as well as a conveyance on sale.

Accordingly, it seems to me that a contract to sell the charitable property without the consent of the Charity Commissioners is not lawful. As it is not lawful, it is not enforceable. I will not express any opinion as regards the position where the contract entered into between the parties is expressed to be conditional on the obtaining by the vendors of the consent of the Charity Commissioners, or anything of that kind. It may be that different considerations may arise, and, in a case of that kind, the purchaser may not be at liberty to withdraw from the transaction if the charitable trustees are duly obtaining the consent of the Charity Commissioners, though it may not have been obtained at some given moment before the time of completion.

Different considerations, as I have said, may arise in that case; but in the present case it seems to me that this was not a lawful contract, and therefore could have no lawful effect so as to bind the purchaser, and the contract is not binding on him. He is, therefore, entitled to recover the deposit which he has paid.

Declaration accordingly.

Solicitors: *Savory, Pryor & Blagden for Hayward, Iliff & Co., Wolverhampton; Miller & Smiths for Shelton, Bates & Wolverson, Wolverhampton.*

J. L. D.

SAUNDERS v. INLAND REVENUE COMMISSIONERS.

1955
July 27.

Wynn-Parry J.

Revenue — Income Tax — Settlement — Revocability — Power to apply capital for benefit of settlor's wife — Power "to revoke or otherwise determine settlement or any provision thereof" — Meaning of "provision" — Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 38 (2).

The trustees of a settlement had power thereunder to apply any part of the capital of the trust funds for the benefit of a specified class including the settlor's wife, with a limitation that the capital of the trust funds should not be reduced below £100. For the year 1951-52 the settlor was assessed, under section 38 (2) of the Finance Act, 1938,¹ to surtax on the income from the property comprised in the settlement. He appealed to the Special Commissioners, who held that the trustees' power was a power to determine a "provision" of the settlement within the second of the two meanings given to "provision" by Lord Simonds in *Berkeley v. Berkeley* [1946] A.C. 555, at p. 580; 62 T.L.R. 478, at p. 483; [1946] 2 All E.R. 154, at p. 166, namely, "the result ensuing from, that which is provided by, a written instrument "or part of it," and held that for that reason, and also because the settlor's wife might, if the power was exercised, become entitled to part of the property, the appeal failed.

On appeal by the settlor:—

Held, dismissing the appeal, that in section 38 (2) the word "provision" meant a benefit conferred by the settlement, as the surrounding language was inapt if taken to refer to a defined part of the settlement.

Inland Revenue Commissioners v. Kenmare (Countess), ante, p. 220 considered.

APPEAL against additional assessment to surtax.

The taxpayer appealed against a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing his appeal against an additional assessment to surtax made on him for the year 1951-1952 in the sum of £4,167. The question for determination before the commissioners was the application of section 38 (2) of the Finance Act, 1938,¹ to a

¹ Finance Act, 1938, s. 38:
 " (1) If and so long as the terms
 " of any settlement are such that—
 " (a) any person has or may have
 " power, whether immediately or in
 " the future, and whether with or
 " without the consent of any other
 " person, to revoke or otherwise deter-
 " mine the settlement or any pro-
 " vision thereof and, in the event of
 " the exercise of the power, the
 " settlor or the wife or husband of
 " the settlor will or may cease to be
 " liable to make any annual payments
 " payable by virtue or in consequence
 " of any provision of the settlement;
 " or (b) the settlor or the wife or
 " husband of the settlor may, whether
 " immediately or in the future, cease,
 " on the payment of a penalty, to be
 " liable to make any annual payments
 " payable by virtue or in consequence
 " of any provision of the settlement;
 " any sums payable by the settlor or

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settlement made by the appellant on July 25, 1951. It was contended on behalf of the appellant that the court ought to give to the phrase "the settlement or any provision thereof" occurring in subsections (1) (2) the same meaning in both subsections.

Clause 1 of the settlement provided that the trustees thereof should invest £100 (which the appellant transferred to them on July 25, 1951), and any further sum or sums which the appellant might thereafter transfer to the trustees in or on authorized investments with power to vary the investments. Clause 2 defined "the trust funds" as including the said £100 and any further sum or sums which the appellant might transfer to the trustees, and provided that the trustees should hold the trust funds on the trusts and subject to the powers and provisions thereafter declared and contained. Clause 3 provided that during an "appointed period" the trustees should pay, divide or apply the income of the trust funds (less any portion thereof the capital whereof should have been appointed under clause 4 of the settlement) to or between or for the maintenance, support or benefit of any one or more to the exclusion of the other or others of a specified class as the trustees should in their absolute discretion determine. Clause 4 provided: "It shall be lawful

"the wife or husband of the settlor
"by virtue or in consequence of that
"provision of the settlement in any
"year of assessment shall be treated
"as the income of the settlor for that
"year. . . . Provided that, where
"any such power as is referred to
"in paragraph (a) of this subsection
"cannot be exercised within the
"period of six years from the time
"when the first of the annual pay-
"ments so referred to becomes pay-
"able, and the like annual payments
"are payable in each year throughout
"that period, the said paragraph (a)
"shall not apply so long as the said
"power cannot be exercised."

"(2) If and so long as the terms
"of any settlement are such that—
"(a) any person has or may have
"power, whether immediately or in
"the future, and whether with or
"without the consent of any other
"person, to revoke or otherwise deter-
"mine the settlement or any pro-
"vision thereof; and (b) in the event
"of the exercise of the power, the

"settlor or the wife or husband of
"the settlor will or may become
"beneficially entitled to the whole
"or any part of the property then
"comprised in the settlement or of
"the income arising from the whole
"or any part of the property so com-
"prised; any income arising under
"the settlement from the property
"comprised in the settlement in
"any year of assessment or from a
"corresponding part of that property
"or a corresponding part of any
"such income, as the case may
"be, shall be treated as the income
"of the settlor for that year. . . .
"Provided that, where any such
"power as aforesaid cannot be
"exercised within six years from the
"time when any particular property
"first becomes comprised in the settle-
"ment, this subsection shall not
"apply to income arising under the
"settlement from that property, or
"from property representing that
"property, so long as the power
"cannot be exercised."

“ for the trustees at any time or times during the appointed
 “ period but subject to the consent in writing of the settlor [the
 “ appellant] during his life and thereafter at their absolute dis-
 “ cretion to pay or apply any part or parts of the capital of the
 “ trust funds to or for the benefit of all or any one or more to the
 “ exclusion of the other or others of the specified class freed
 “ and released from the trusts concerning the same provided
 “ always that during the life of the settlor any exercise by the
 “ trustees with such consent as aforesaid of the power in this
 “ clause contained shall be subject to the limitation that the
 “ capital of the trust funds remaining subject to the trusts of this
 “ settlement immediately after such exercise shall be of a value
 “ of not less than £100.”

The members of the specified class of persons were set out in the schedule to the settlement and included the appellant's wife.

On August 13, 1951, the appellant transferred a further £25,000 to the trustees of the settlement, making a total of £25,100 as then comprising the trust funds and as subject to the trusts of the settlement. The trustees invested £25,000 and £100 was left uninvested. In the year ended April 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d.

For the appellant it was contended that (a) the £100 and £25,000 together constituted one settlement for the purposes of Part IV of the Finance Act, 1938; (b) the property comprising for the time being the trust funds was not of itself a provision of the settlement within the meaning of section 38 (2) of that Act; (c) in any event, there was no power in clause 4 or elsewhere in the settlement to determine a provision of the settlement within the meaning of that subsection; (d) the provisions of the subsection did not apply to the settlement; (e) alternatively, if the transfers of £100 and £25,000 each constituted a settlement for the purposes aforesaid, neither was one the provisions of which were such that section 38 (2) applied thereto; and (f) the assessment appealed against should be discharged.

For the Crown it was contended that (a) each of the said transfers was a settlement as being a disposition or arrangement within the meaning of section 41 (4) (b) of the Finance Act, 1938; (b) the terms of the settlement were such that the income arising thereunder was to be treated as income of the appellant under section 38 (2); (c) even if the transfers were comprised in one settlement the terms of that settlement were such as to bring it within that subsection, and (d) the appeal should be dismissed.

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The commissioners held that the £100 and the £25,000 were comprised in one settlement and that the trustees' power, by virtue of clause 4 of the settlement, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more of the specified class, with a limitation that the capital of the trust funds should not be reduced below £100, was a power to determine a "provision" of the settlement in the sense of the second of the two meanings given to the word "provision" by Lord Simonds in *Berkeley v. Berkeley*,² namely, "the result ensuing from, that which is provided by, a written instrument or part of it." They held also that the appellant's wife, in the event of the exercise of the discretionary power by the trustees, might become entitled to part of the property comprised in the settlement. For those reasons they held that the appeal failed, but they subsequently determined the appeal by reducing the additional assessment for the year 1951-1952 to £4,153.

The taxpayer appealed.

A. P. L. Barber for the taxpayer. The commissioners were wrong in holding that the appeal against the additional assessment failed, but for the purposes of the present appeal the Crown does not contest their finding that the sums of £100 and £25,000 are comprised in the settlement of July 25, 1951. Accordingly, the taxpayer now appeals only against their finding that the power of the trustees under clause 4 of the settlement is a power to determine a "provision" in the sense, as described by Lord Simonds in *Berkeley v. Berkeley*,² of "the result ensuing from, that which is provided by, a written instrument or part of it."

The expression "to revoke or otherwise determine the settlement or any provision thereof" occurs in subsections (1) and (2) of section 38, the wording of both subsections being the same down to and including the words "the settlor or the wife or husband of the settlor will or may . . ." Thereafter, as subsection (1) deals with income and subsection (2) with capital, the wording differs: but the word "provision" should be given the same construction in both subsections, and it is contended that the commissioners were wrong in giving to it the wider of the two constructions described by Lord Simonds. As is shown by the use of the word "revoke," it here means, not the result ensuing from, that which is provided by, a written instrument

² [1946] A.C. 555, 580; 62 T.L.R. 478, 483; [1946] 2 All E.R. 154, 166.

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or part of it, but a clause or proviso, a defined part of a written instrument. If the trustees exercised the power conferred by clause 4 of the settlement they would not be revoking a provision of the settlement but paying or applying part or parts of the capital as in that clause provided. Further, there is not anywhere in the settlement a power to "determine" the settlement within the meaning of subsection (2), and the subsection does not apply. [Reference was made to *Wolfson v. Inland Revenue Commissioners*³; *Vestey's Executors v. Inland Revenue Commissioners*⁴ (on the application of the subsection to the settlor's wife); and *Taylor v. Inland Revenue Commissioners*.⁵]

Geoffrey Cross Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown. The finding of the commissioners was correct. The court should reject the contention that "provision" in subsection (2) cannot have the wider meaning described by Lord Simonds in *Berkeley v. Berkeley*.⁶ The words "or otherwise determine" must have a meaning different from that of "revoke" or they would not be there. They must mean "put an end to by a process other than revocation." In the opening words of subsection (2) the word "terms" means, not "conditions" but the wording, the actual language, of the settlement. "Provision" means, not a clause or proviso in the settlement, but the result ensuing from, that which is provided by, it. The very wording of the proviso to the subsection makes that quite clear, for, if "provision" did not there mean that which is provided by the settlement, the proviso itself would be ineffective. [Reference was made to *Inland Revenue Commissioners v. Countess of Kenmare*.⁷]

WYNN-PARRY J. In the case stated by the Special Commissioners of Income Tax they expressed the view that the two sums, of £100 and £25,000, were comprised in one settlement, the terms of which were set out in the deed of July 25, 1951, and for the purpose of this appeal only the Revenue does not challenge this conclusion. That leaves one short point in dispute which turns on the construction of section 38 of the Finance Act, 1938, and clause 4 of the settlement.

Clause 4 is in these terms: "It shall be lawful for the trustees at any time or times during the appointed period but

³ (1949) 31 T.C. 141; sub nom. *I. R. C. v. Wolfson*, 65 T.L.R. 260; [1949] 1 All E.R. 865.
⁴ (1949) 31 T.C. 1; [1949] 1 All E.R. 1108.
⁵ (1946) 27 T.C. 93; [1946] 1 All E.R. 488n.
⁶ [1946] A.C. 555, 580; 62 T.L.R. 478, 483; [1946] 2 All E.R. 154, 166.
⁷ Ante, p. 220.

1955 , “ subject to the consent in writing of the settlor during his life and
 SAUNDERS “ thereafter at their absolute discretion to pay or apply any part
 v. “ or parts of the capital of the trust funds to or for the benefit
 INLAND “ of all or any one or more to the exclusion of the other or others
 REVENUE “ of the specified class freed and released from the trusts con-
 COMMIS- “ cerning the same.” Then follows the proviso: “. . . during
 SIONERS. “ the life of the settlor any exercise by the trustees with such
 Wynn-Parry J. “ consent as aforesaid of the power in this clause contained shall
 “ be subject to the limitation that the capital of the trust funds
 “ remaining subject to the trusts of this settlement immediately
 “ after such exercise shall be of a value of not less than one
 “ hundred pounds.”

Section 38 (1) deals with payments in the nature of income and, as was pointed out by Mr. Barber for the appellant, down to a certain point its language is exactly the same as that employed in subsection (2), which is designed to deal with capital. Mr. Barber urged on me that I should not place on the word “provision” a different meaning in subsection (2) from that to be given to it in subsection (1), and I have no intention of doing so, as I quite accept the principle that it should be given the same meaning wherever it occurs in the section. As I propose to put the same meaning on the word in both subsections it will be sufficient if I confine my analysis to subsection (2), which applies in this case.

The subsection opens with the words “If and so long as the terms of any settlement are such . . .” and I agree with Mr. Cross, who appears for the Crown, that the phrase “the terms” there merely means the language employed. Paragraph (a) of the subsection proceeds: “any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof;”.

It was urged for the appellant that the word “provision” must mean some written part of the instrument and cannot have the alternative meaning applied by the House of Lords in *Berkeley v. Berkeley*.¹ Lord Simonds pointed out (as did the others of their Lordships in slightly different language) that the word “provision” “is a word of diverse meanings which slide easily into each other. It may mean a clause or proviso, a defined part of a written instrument. Or it may mean the result ensuing from, that which is provided by, a written instrument or part of it.”

¹ [1946] A.C. 555, 580; 62 T.L.R. 478, 483; [1946] 2 All E.R. 154, 166.

The Special Commissioners took the view that, on the true construction of section 38 (2) of the Finance Act, 1938, "provision" was in its context wide enough to bear the second of the two meanings mentioned by Lord Simonds. The appellant contends that that is not so.

It appears to me that the problem is to be solved by considering the phrase "to revoke or otherwise determine the "settlement or any provision thereof." If the word "provision" meant only a clause or proviso, a defined part of a written instrument, it would have been unnecessary to include in the subsection the words "or otherwise determine," for the use of the verb "revoke" would have sufficed, that being from the conveyancer's point of view the natural word to use, whether the revocation was to cover the whole of the settlement or only specific parts of it. The word "determine" appears to me to be an inapt word to use where the object is to provide a power to bring to an end the operation of a defined part of a written instrument. On the other hand, I must, if I can, give effect to the words "or otherwise determine," because they are clearly put in deliberately for the purpose of achieving something further than the word "revoke" alone. The word "determine" seems to me to be an apt word to use where the power contemplated is to bring to an end some benefits provided by the settlement. As Mr. Cross, for the Crown, pointed out, that construction is, I think, reinforced by the proviso to section 38 (2), which it is difficult to see as having any operation at all without it.

Looking, therefore, merely at the subsection, and neither helped nor embarrassed by authorities, I should come to the conclusion that the decision of the Special Commissioners was correct. I can see nothing in the language of section 38 (1), or in the authorities cited on problems arising under that subsection, which would prevent the construction which I have placed on subsection (2) being placed on the language of subsection (1).

I come to this conclusion without basing myself on the judgment of Danckwerts J. in *Inland Revenue Commissioners v. Countess of Kenmare*,² because it may be said that that case may be distinguishable on the ground that there was a possibility in that case that the whole of the trust funds might find their way back to the settlor. Although Danckwerts J. regarded that possibility as remote, he mentioned it in his judgment when arriving at his conclusion as to the effect of section 38 (2). As I read

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² Ante 225.

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his judgment, however, I think that it is a fair inference that he would have come to the same conclusion apart from that consideration and, therefore, although I do not base myself on that judgment, I think that, to a very great extent, if not entirely, it supports the construction of section 38 (2) which I have adopted. For those reasons, in my view, this appeal fails.

Appeal dismissed.

Solicitors: *Henry Pumfrey & Son; Solicitor of Inland Revenue.*

K. R. A. H.

C. A.

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Feb. 6, 7;
Mar. 5.

[1955 B. No. 1670.]

Lord
Evershed M.R.,
Jenkins and
Birkett L.JJ.

Landlord and Tenant—Act of 1954—Business premises (Security of tenure)—Flats—Premises sublet as flats—Whether subletting of flats a “business” within the Act—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2, c. 56), s. 23 (1), (3).

Statute—Construction—Absurdity—Construction to produce sensible result preferred.

The defendants carried on the business of holders, managers and landlords of real property, and in the course of that business took an assignment of a leasehold interest in premises comprising 13 self-contained flats (10 of which were sublet at the material time), halls, passages, landings and stairs in common use together with further accommodation in the basement for a caretaker, boiler rooms, storerooms and fuel stores. The defendants provided hot water for their tenants and cleaned the common parts of the premises, though not obliged by the terms of the subleases to do so, and they also stored articles for the tenants in the basement storage rooms.

On February 23, 1955, the defendants made a request to their landlords for a new tenancy of the whole premises, their existing tenancy being due to expire on March 25, 1955:—

Held, that although the purposes for which the entire premises, including the flats which were sublet, were used by the defendants were “the purposes of a business” carried on by them within the meaning of section 23 (1) of the Landlord and Tenant Act, 1954, the tenancy was not one to which Part II of that Act applied. The power conferred by those provisions to grant a new tenancy related only to premises or parts of premises which were occupied by a tenant or by his employees, and it was implicit in those provisions that the business in question must not be of such a character that it was necessarily terminated under such a new tenancy. Once the tenancy of the defendants in the entirety of the premises had expired, the remainder of the premises (other than the flats which

were vacant at the material time), which had formerly been occupied by them as ancillary to the flats which were sublet and, therefore, for the purposes of the "business" carried on by them in the entire premises, could no longer be occupied for that purpose. The vacant flats were not in the occupation of the defendants for the purposes of the business of subletting, but were occupied by them only until they could exclude themselves from occupation by subletting.

Decision of Wynn-Parry J., ante 75; [1955] 3 All E.R. 451 affirmed.

APPEAL from Wynn-Parry J.¹

The following statement of the facts is taken substantially from the judgment of Jenkins L.J.

The defendants carried on the business of holders, managers and landlords of real property. In the course of such business they acquired by an assignment dated March 25, 1949, the leasehold interest in premises comprising Nos. 99, 101 and 103, Gloucester Place, London, W.1, under a lease dated September 19, 1921, whereby the premises were demised for a term of 33½ years from September 29, 1921, which expired, or, apart from any relevant provisions of the Landlord and Tenant Act, 1954, would have expired, on March 25, 1955, by effluxion of time. The freehold reversion in the premises immediately expectant on the determination of this term was at all material times vested in the plaintiffs. The premises were divided into: (a) 13 self-contained residential flats, one of which was in the basement; (b) other accommodation in the basement comprising rooms for a resident caretaker, boiler rooms, storerooms, and fuel stores, and (c) the common parts of the premises in the shape of halls, passages, landings and stairs.

The defendants acquired the premises with a view to the profit to be derived from the subletting of the flats, and 10 of them were at all material times sublet to various tenants. Of the remaining three flats the defendants had, on February 22, 1955, and thereafter, vacant possession of flat No. 3, and since March 25, 1955, they had had vacant possession of flat No. 4. Possession of flat No. 18 was taken by the plaintiffs from the defendants' tenant on March 25, 1955 (wrongfully, the defendants alleged).

The caretaker's rooms in the basement were occupied by a caretaker until March 25, 1955, and had since been vacant. The storerooms were used for the storage of cleaning materials, surplus articles of furniture, brushes, vacuum cleaners and other

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such articles. The evidence did not account for the presence of surplus articles of furniture, but as the flats were let unfurnished, it was probable that these were articles belonging to tenants stored away by the defendants for their tenants' convenience. The cleaning materials, brushes, vacuum cleaners, and so forth, stored in the basement were used for cleaning the common parts of the premises. The boiler rooms housed boilers which provided hot water for the flats. The fuel stores contained the fuel required for the boilers, and possibly fuel belonging to tenants of the flats, though this did not appear from the evidence. The common parts of the premises were not included in any of the sublettings, but the tenancy agreements gave to the occupants of the flats rights of user over them in common with the defendants and their other tenants. The defendants were not obliged to provide their tenants with hot water nor to clean the common parts of the premises, but the defendants, for the purpose of the better running of their business, provided hot water and cleaned the common parts of the premises so as to make the premises more attractive to their existing and prospective tenants.

On February 23, 1955, the defendants served on the plaintiffs a notice dated February 22 asking for a new tenancy of the whole of the premises. The plaintiffs did not accede to that request, and in consequence, on June 21, 1955, the defendants applied to the court under the Act of 1954, asking for an order under section 24 of the Act.²

² Landlord and Tenant Act, 1954, s. 23: "(1) Subject to the provisions 'of this Act, this Part of this Act 'applies to any tenancy where the 'property comprised in the tenancy 'is or includes premises which are 'occupied by the tenant and are so 'occupied for the purposes of a business carried on by him or for those 'and other purposes. (2) In this 'Part of this Act the expression 'business' includes a trade, profession or employment and includes 'any activity carried on by a body of 'persons, whether corporate or unincorporate. (3) In the following provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, 'there being excluded any part there-

'of which is occupied neither by the 'tenant nor by a person employed 'by the tenant and so employed for 'the purposes of a business by reason 'of which the tenancy is one to which 'this Part of this Act applies. . . ."

S. 24: "(1) A tenancy to which 'this Part of this Act applies shall 'not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, 'subject to the provisions of section '29 of this Act, the tenant under 'such a tenancy may apply to the 'court for a new tenancy—(a) if the 'landlord has given notice under the 'next following section to terminate 'the tenancy, or (b) if the tenant has 'made a request for a new tenancy 'in accordance with section 26 of this 'Act. . . ."

S. 32: "(1) Subject to the next

The plaintiffs took out a summons asking whether, on the true construction of the Landlord and Tenant Act, 1954, the defendants had a tenancy of 99, 101 and 103, Gloucester Place, to which Part II of the Act applied. Wynn-Parry J. declared in their favour that the defendants had not such a tenancy, and the defendants appealed.

D. J. Ackner for the defendants. To decide whether the defendants' tenancy is within the scope of Part II of the Landlord and Tenant Act, 1954, a twofold test must be applied. The first limb is whether part or all of the premises are occupied by the defendants. To be in "occupation" in the relevant sense, a tenant must show that he has legal possession and he must make some use of the property, but he need not be physically in or on the property. There is no direct authority on this sort of enactment, but the rating practice is analogous. [Reference was made to *Liverpool Corporation v. Chorley Assessment Committee and Withnell Overseers*.³] Clearly the defendants can satisfy this part of the test, for they are not only in legal possession but in actual physical occupation of at least that part of the premises which comprises the storage rooms, boiler rooms, hall, staircases, passages and landings.

The second limb of the test is whether the part occupied by the defendants was so occupied by them for the purposes of their business. "Occupation" is the test, not "user" as under the Landlord and Tenant Act, 1927. Since a company can be in occupation of land which is used for the purposes of its business, the defendant company was in occupation of the whole block for

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" following subsection, an order under
" section 29 of this Act for the grant
" of a new tenancy shall be an order
" for the grant of a new tenancy of
" the holding; and in the absence of
" agreement between the landlord and
" the tenant as to the property which
" constitutes the holding the court
" shall in the order designate that
" property by reference to the circum-
" stances existing at the date of the
" order. (2) The foregoing provisions
" of this section shall not apply in a
" case where the property comprised
" in the current tenancy includes
" other property besides the holding
" and the landlord requires any new
" tenancy ordered to be granted under
" section 29 of this Act to be a ten-
" ancy of the whole of the property

" comprised in the current tenancy;
" but in any such case—(a) any order
" under the said section 29 for the
" grant of a new tenancy shall be an
" order for the grant of a new tenancy
" of the whole of the property com-
" prised in the current tenancy, and
" (b) references in the following pro-
" visions of this Part of this Act to
" the holding shall be construed as
" references to the whole of that pro-
" perty. (3) Where the current ten-
" ancy includes rights enjoyed by the
" tenant in connexion with the hold-
" ing, those rights shall be included
" in a tenancy ordered to be granted
" under section 29 of this Act."

³ [1912] 1 K.B. 270; 28 T.L.R.
177 (affirmed [1913] A.C. 197; 29
T.L.R. 246).

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the purposes of its business, that is, the business of letting and subletting flats. As regards those parts of the premises which were physically occupied by the defendants, the judge accepted that these were in fact occupied by them for the purposes of their business, for they were used to provide the subtenants with services and amenities. The defendants were not under any contractual obligation to provide such services, but they did so in order to attract and retain their tenants; that is, for the purpose of their business.

The next question is whether the "business" of the defendants is within the scope of the definition in section 23 of the Act. Although letting and subletting flats would not have been within section 17 (3) of the Landlord and Tenant Act, 1927, and although there might have been some difficulty if the applicant had been a private individual, there is no doubt that the letting and subletting of flats for purposes of profit when carried on by a company is a "business" in the relevant sense. Oblique assistance on this question is obtained from *Smith v. Anderson*.⁴

Wynn-Parry J. accepted that on these grounds the Act would apply, but he then went on to say that, to avoid absurdity, a tenant must show that the part of the premises in respect of which a new tenancy could be granted would be such as would enable that tenant to carry on his business. While there is authority for the view that unambiguous language in an Act of Parliament may in suitable cases be rejected to avoid an absurdity, the absurdity must be shown to be inherent in the Act and to be such that rejection was imperative in order to avoid it. [Reference was made to *Prince Ernest of Hanover v. Attorney-General*.⁵] An absurd position does not necessarily result from a declaration in the defendants' favour, even if they are unsuccessful in showing that they are entitled to a tenancy of the whole premises. The landlords may insist that the defendants should take a tenancy of the whole premises: see section 32. Or the defendants may, in the end, refuse the new tenancy if it would be useless to them. The court can avoid an absurdity by exercising the powers conferred by sections 33, 34, 35. [Reference was made to *Upsons Ltd. v. E. Robins Ltd.*⁶] If the court was of opinion that an application was merely a manoeuvre and that a grant of a new tenancy could not achieve the purpose of continuing the business of the tenant, it could order that a new

⁴ (1880) 15 Ch.D. 247.

⁶ [1956] 1 Q.B. 131; [1955] 3 All

⁵ [1955] Ch. 440; [1955] 3 All E.R. 348.

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tenancy should be granted for a day only, or for a week or a month. At the expiration of that period the tenant would not be able to get a further extension on application to the court, for he would then be unable to show that he was then in occupation for the purpose of his business. Further, the court in granting a new tenancy, could impose conditions requiring the tenant, for example, not to interfere with the access of the persons in occupation of the flats and to continue to provide them with the services and amenities with which they had previously been provided.

It is not correct to say that the defendants are only seeking to establish a nuisance value. If the Act applies at all, the whole tenancy must continue until the matter has been disposed of by the court and for a further period of three months thereafter. This in itself is a substantial advantage to them.

[LORD EVERSHED M.R. But that is using the Act for purposes which are quite foreign to the intention of Parliament. The Act is intended to enable a tenant to get a grant of a new tenancy, not to keep the old one going.]

L. A. Blundell for the plaintiffs. It is not suggested that the activity of letting flats can never be a "business" within Part II of the Landlord and Tenant Act, 1954; nor was Wynn-Parry J. saying that, though possibly one sentence in his judgment tends that way.⁷ Nor is it suggested that no portion of the premises is occupied by the defendants in the ordinary sense. The ordinary sense may not, however, be the relevant statutory sense. As regards the flats which are occupied and let, it is clear that the defendants cannot be in occupation of these whilst they are in fact occupied by the subtenants. Nor is it conceded that the two flats which are unoccupied and vacant are in the occupation of the defendants in the popular sense or even for rating purposes. There are, it is true, some subsidiary parts of the premises which are occupied by the defendants, but it is by no means clear from the evidence that they are in exclusive occupation even of those parts. As regards the staircase and other common parts, the defendants were in occupation for certain purposes, for example, for the purpose of seeing that the staircase was kept safe, but the parts occupied by them were insignificant in comparison with the rest of the premises.

The vital question is what is meant in the Act by premises occupied by the tenant for the purposes of a business carried on by him. "Occupation" and "business" cannot be isolated from the rest of the clause. In that context the words mean

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⁷ Ante 75, 80.

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“ occupation of the holding for the purpose of carrying on the
 “ business, such that the award of a new tenancy under the Act
 “ would enable the tenant to continue that business on the
 “ ‘ holding.’ ”

The Act was directed to giving security of tenure to business tenants on the premises on which they carry on their business. It would be odd if the correct construction of the Act should lead to a perpetuation of tenancies of odd bits of premises and the existing business should be given no security of tenure.

The definition of “ holding ” in section 23 (3) supports the view that the interpretation put forward by the defendants cannot be the correct one. “ Occupied ” in subsection (3) must be used in the same sense as in subsection (1). There would be difficulty in applying the defendants’ construction in section 34, which requires the ascertainment of the market rent of the “ holding ” as on a letting by a willing lessor. That section envisages that the holding is something which might reasonably be expected to be let on the open market, but it is impossible to imagine a willing lessor for this hereditament, and equally impossible to imagine the rent at which it would be let.

[JENKINS L.J. Does not the same sort of problem arise on rating?]

For rating purposes the value of the occupancy is found by reference to the terms of a hypothetical letting, however unlikely, but here the court is directed to fix the rent by reference to what the holding “ might reasonably be expected to be let ” at in the open market.

“ Occupation ” in the relevant sense is a question of fact, as distinct from a question of legal possession. Mere occupation is not necessarily sufficient; the tenant must be in occupation for the purposes of his business. In that sense the flats which happen to be unlet at the relevant time are not occupied by the defendants for the purposes of their business. If when the flats fell empty the defendants had occupied them for the purpose of the business of management, for example, as an office in which to prepare new leases, the position might have been different.

It is incorrect to say that the business of flat letting was excluded from the Act of 1927 and that it is included in the Act of 1954. There was excluded from the Act of 1927 expressly only such businesses of subletting as might otherwise have been within it. In the Act of 1954 the requirement of “ user ” has been dropped, but it is still required that there should be a “ holding ” under a lease. Parliament may have taken the view that that

was sufficient and that there was no need to put in an express exclusion of the business of subletting flats. The true view of these premises is that the defendants' occupation is entirely ancillary to the residential occupation of the flats. The Act shows a clear intention to differentiate business from residential tenancies.

If there are alternative constructions, the court will reject the one which leads to an absurdity: see Maxwell on Interpretation of Statutes, 6th ed., p. 6, which is founded on *Grey v. Pearson*.⁸ In *Prince Ernest of Hanover v. Attorney-General*⁹ the doctrine did not apply, but there much turned on the point that the result of one construction was inconvenient rather than absurd. Similarly, in *Trevillian v. Exeter Corporation*¹⁰ the question was one of interpreting difficult words in a statute rather than of avoiding an absurd result. The present case is nearer to *Yates v. The Queen*.¹¹ The absurdity arises as soon as the Act comes into force and not because of a change of circumstances years afterwards. It will arise not only in this but in a large number of cases, and cannot be avoided by making a grant for only a short period. The attempted retention by the tenant can only be for the purpose of getting bargaining power with the landlord.

Ackner replied.

Cur. adv. vult.

March 5. LORD EVERSHERD M.R. I have had the advantage of reading in advance the judgment prepared by Jenkins L.J. I agree with his reasons for thinking that the phrase in section 23 (1) of the Landlord and Tenant Act, 1954, "occupied by" the tenant "for the purposes of a business carried on by him," when properly construed in its context, cannot sensibly have been intended by Parliament to apply to those parts of the premises in the present case now occupied by the defendants (namely, the two or three vacant flats, the storerooms and other basement accommodation and the halls, staircases and other parts of the structure not comprehended in any of the lettings to subtenants), which, whatever may have been the case before, cannot in the defendants' hands from the moment of commencement of any new tenancy which the defendants can ask the court to direct possibly serve the purposes of the defendants' business. Without, therefore, adding any reasons of my own, I agree with my brother that the appeal must fail.

⁸ (1857) 6 H.L.C. 61, 106.

⁹ [1955] 3 W.L.R. 868.

¹⁰ (1854) 5 De G.M. & G. 828.

¹¹ (1885) 14 Q.B.D. 648; sub nom. *Reg. v. Yates*, 1 T.L.R. 193.

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During the course of the argument I expressed some doubt whether the plaintiffs' application by originating summons under R.S.C., Ord. 54A, r. 1, was one which the court ought properly to entertain, having regard particularly to the fact that by the terms of the Act Parliament had made special provision for the procedure whereby questions in dispute under the Act might be determined by the courts, and to the further fact that in some cases, as it seems to me at present, questions might arise of the proper dates on which for the purpose of the Act such matters as the true extent of "the holding," as therein defined,¹ should be ascertained. I am, however, satisfied, having regard to our conclusion in the present case, that the terms of section 64 (1)² of the Act could not be invoked for the purpose of extending the defendants' tenancy beyond its expiry in March, 1955, and that no other question of dates could properly here arise. And since, further, both Mr. Ackner and Mr. Blundell were content that we should give our answer to the question raised by the originating summons, I do not find it necessary to refer further to the doubts which I had expressed.

JENKINS L.J. This case raises a curious and not altogether easy question under the Landlord and Tenant Act, 1954.

[His Lordship stated the facts as set out above and continued:] The case turns largely upon the true construction of subsections (1), (2) and (3) of section 23 of the Act of 1954.

[His Lordship read the subsections and section 32, and continued:] It is right, further, to notice the wide discretion given to the court by sections 33, 34 and 35 as regards the duration, terms and conditions of any new tenancy ordered.

The argument for the defendants based on these statutory provisions is short and simple. It is said, first, that the sub-letting of unfurnished residential flats is a "business" both in the ordinary sense of that expression and also within the meaning properly attributable to it in section 23. For this

¹ See s. 23 (3) of the Act of 1954.

² Landlord and Tenant Act, 1954, s. 64: "(1) In any case where—(a) 'a notice to terminate a tenancy has been given under Part I or Part II of this Act or a request for a new tenancy has been made under Part II thereof, and (b) an application to the court has been made under the said Part I or the said Part II, as the case may be, and (c) apart

"from this section the effect of the 'notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of, the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time. . . ."

submission powerful support is found in the contrast between the definition of "business" contained in section 23 (2) of the Act of 1954 and the language of section 17 (3) of the Landlord and Tenant Act, 1927, and in the assumption that, unless excluded by definition, the subletting of flats is a trade or business, implicit in the latter enactment which, by way of exception from the general rule laid down in section 17 (1) to the effect that the holdings to which Part I of the Act applies are "any premises held under a lease . . . and used wholly or partly for carrying on thereat any trade or business . . .," provides: "(3) For the purposes of this section, premises shall not be deemed to be premises used for carrying on thereat a trade or business—. . . (b) by reason that the tenant thereof carries on the business of subletting the premises as residential flats, whether or not the provision of meals or any other service for the occupants of the flats is undertaken by the tenant: . . ."

This proposition (which accords with the view of Luxmoore J. in *Barton v. Reed*³) I, for my part, accept, and it follows that the purposes for which the premises here in question (that is to say, the entire premises including the flats sublet) are used by the defendants are "the purposes of a business carried on by" them within the meaning of section 23 (1).

Next the defendants argue that the purposes for which they use the premises being the purposes of a business carried on by them within the meaning of the Act, the premises in fact are occupied by them for the purposes of that business, namely, the basement rooms (other than the flat in the basement), and also the common parts of the premises and the three flats now unlet, possession of one of which was (wrongfully, as they say) obtained by the plaintiffs. Therefore, say the defendants, the property comprised in their tenancy does, within the meaning of section 23 (1), include premises (that is to say, the basement rooms other than the flat in the basement, the three unlet flats and the common parts of the premises) "which are occupied by them and are so occupied for the purposes of a business carried on by them or for those and other purposes." They add (as, I think, with force) that the taking possession by the plaintiffs of one of the three unlet flats should not be allowed to prejudice their position so far as it depends upon occupation of any part of the premises. I agree that the words of section 23, applied *literatim* to the facts of the present case, appear at first sight

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to justify the defendants' contention. But section 23 must be construed in its context and with due regard to the substance and manifest intention of the enactment. Considered from this point of view, the defendants' argument becomes less convincing. I would observe that the manifest intention of Part II of the Act (headed "Security of Tenure for Business, Professional and other Tenants") is, so far as business tenants are concerned, to protect such tenants in their occupation of premises for business purposes. The relevant object, as expressed in the long title, is "to enable tenants occupying property for business . . . purposes" "to obtain new tenancies in certain cases." I note also that, while a tenant occupying premises partly for business and partly for other purposes may, by the joint effect of sections 23 and 24, apply for a new tenancy in respect of the whole of the property comprised in the tenancy so far as it is occupied either by the tenant himself or by a person employed by the tenant and so employed for the purposes of the relevant business, any part of such property not so occupied is excluded by section 23 (3) from the definition of the "holding" for the purposes of Part II of the Act; and that (save by agreement between the parties or on a requisition by the landlord that the whole of the property should be included in the new tenancy) the power of the court to grant a new tenancy is limited by section 32 to the holding as so defined and nothing more. I think that the absence from section 23 (2) of the Act of 1954 of any exclusion of the subletting of flats from the category of trade or business such as appears in section 17 (3) of the Act of 1927 may be accounted for by the consideration that, whereas the criterion for protection under Part I of the Act of 1927 was use for business purposes, the criterion of protection under Part II of the Act of 1954 is occupation for business purposes. A building wholly sublet in flats from top to bottom could not qualify for protection under Part I of the Act of 1927 because such subletting would not be a use of the premises for carrying on a trade or business within the meaning of the Act, by reason of its exclusion by section 17 (3). A building similarly dealt with could not qualify for protection under Part II of the Act of 1954, not because the subletting of the premises in flats would not be a business within the meaning of section 23 of that Act, but because the tenant would ex hypothesi not be in occupation of any part of the premises. In a case in which the tenant of premises sublet part of them in flats and retained the remainder in his own occupation for the

purpose of providing services for the tenants of the part comprised in the sublettings (which is, in effect, this case) the tenant could not have claimed protection under Part I of the Act of 1927 because of the exclusion of the subletting of flats from the definition of use for carrying on a trade or business in section 17. In a like case under the Act of 1954 the tenant can claim, rightly as I think, that the subletting of the flats is a business within the meaning of section 23 and can also claim, again rightly as I think, that the purposes for which he occupies the remainder of the premises, that is to say, the provision of services for the tenants of the flats sublet, are purposes of a business carried on by him within the meaning of the same section. So far, then, he satisfies section 23 both as regards the occupation of part of the premises by him, and as regards the purposes of such occupation, which are purposes of his business of subletting the flats into which the part of the premises not in his occupation is divided. But these claims can surely be maintained only so long as the tenant continues as tenant of the entirety of the premises, whether occupied by him or sublet. Once the flats which it is his business to sublet are excluded from his tenancy the remaining parts of the premises, though still in his occupation, are no longer occupied by him for the purposes of any business. Once the flats are gone the business for the purposes of which he formerly occupied the remainder of the premises, that is to say, the provision of services for the tenants of the flats sublet, as part of the entire business of letting and managing those flats, is gone also, and is incapable of continuance or revival.

What is the bearing of Part II of the Act of 1954 on such a case? I repeat that its manifest intention is (to quote once more the language of the long title appropriate to this case) "to enable tenants occupying property for business . . . purposes "to obtain new tenancies in certain cases." That intention is, as I think, faithfully carried out by the provisions of Part II of the Act upon a fair and reasonable construction of those provisions. I think it is implicit in those provisions, and in particular sections 23 and 32, that the business for the purposes of which a tenant occupies premises of which he claims a new tenancy must not be of such a character that it is necessarily brought to an end by the very process of the ascertainment of the holding and the ordering and granting of a new tenancy of the holding as ascertained, with the result that the tenant is presented with a holding which, though occupied by him, is not so occupied for the purposes of any business whatever.

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Applying this principle to the present case, I find that the ascertainment of the holding must involve the subtraction from the property comprised in the tenancy of the 10 sublet flats, for these are occupied neither by the tenant nor by any person employed by him. There thus remain as the potential subject-matter of the new tenancy the caretaker's rooms, storerooms and boiler rooms in the basement, the common parts of the premises, and the three unlet flats. Divorced from the 10 sublet flats, can any part of these premises be said to be occupied by the tenant for the purposes of any business carried on by him? That question must, I think, be answered in the negative. There can be no business carried on by the tenant of providing hot water for the sublet flats, or of cleaning the common parts of the premises for the benefit of the tenants of those flats, or of providing those tenants with means of access to and from those flats, once the sublet flats are ruled out of consideration as disqualified from inclusion in the holding to which any new tenancy granted must be confined. Nor, in my view, can there be any business carried on by the tenant of serving in any of the ways above mentioned the three unlet flats so long as they remain unlet, while if let at any time before the ordering of a new tenancy, they would be subject to the same disqualification as the 10 flats now let. Finally, I do not think that the three unlet flats (all of which I treat for the present purpose as in the occupation of the defendants) can properly be treated as occupied by the defendants for the purposes of any business carried on by them. The defendants no doubt hope in due course to turn these three flats to account in their business by subletting them to tenants. But this, in my view, is not occupation of these three flats by the defendants for the purposes of a business carried on by them. On the contrary, it is occupation until such time as the defendants may be able, for reward in the shape of rent, to exclude themselves from occupation by subletting. Furthermore, I repeat that if these three flats were in fact sublet at any time before the order for a new tenancy, they would be disqualified from inclusion in the holding in the same way as the 10 now sublet.

For the reasons I have endeavoured to state, I conclude that the tenancy here in question is not a tenancy to which Part II of the Act of 1954 applies. I would emphasize that my view of this case is closely related to its own particular facts, and especially to the fact that the purposes for which the defendants have been occupying the parts of the premises other than the

flats themselves are purposes ancillary, and indeed wholly and exclusively related, to the subletting of these particular flats, so that they must necessarily come to an end with the cesser of the defendants' interest in these flats.

As to the exclusive relation of such purposes to these particular premises, I may perhaps quote a passage from the affidavit of a director of the defendants: "The defendants are further in occupation of the basement premises (other than the two rooms let as a flat) and the common parts of the premises. The defendants further submit that they so occupy these premises for the purpose of their business of letting, managing, controlling and running the said premises within the meaning of section 23 of the said Act." There may be cases in which mesne landlords of flat properties retain and occupy parts of their premises for business purposes of kinds capable of surviving the cesser of their interest in the flats themselves. Again, there no doubt are cases where property companies occupy offices for the purpose of carrying on the business of managing the various properties from time to time held by them. To cases such as these different considerations apply, and I say nothing about them.

I am fortified in the conclusion to which I have come by the absurdity of the situation which would arise in the present case if the contrary view were accepted, but need add nothing to what was said by Wynn-Parry J. on this aspect of the matter, by which his decision was largely influenced. I agree with him that this criticism is not adequately met by the right given to the landlord by section 32 of insisting on a new tenancy of the whole of the property comprised in the current tenancy, or by the wide discretionary powers conferred on the court by other sections to which I have referred.

In the result, I am of opinion that Wynn-Parry J. came to a right conclusion in this matter, and I would dismiss this appeal.

BIRKETT L.J. I agree entirely with the judgment of Jenkins L.J. and feel it unnecessary to add anything to it.

Appeal dismissed.

Solicitors: *Clarke, Square & Co.; Harris, Chetham & Co.*

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[1954 M. No. 2596.]

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Birkett and
Romer L.JJ.

Landlord and Tenant—Covenant for quiet enjoyment—Easement—Use of adjoining premises—Whether implied covenant to put tenant in possession of demised premises—Whether excluded by express covenant for quiet enjoyment—Interruption by person outside scope of express covenant.

Contract—Construction—Expressio unius exclusio alterius.

Landlords demised premises to a tenant together with the right to use two lavatories on upper floors which were occupied by a third party. The grant contained a covenant for quiet enjoyment of the demised premises without interruption from the landlords "or the superior landlords" or any person rightfully claiming under or in trust for them. The tenant was prevented by the third party from exercising his right to use one of the lavatories and he sued his landlords, alleging a breach of an implied covenant that they had a good title to convey to him the right to use the lavatories, and, alternatively, a breach of an implied covenant that they would put him into possession of the right demised to him. The third party held under a title paramount to the landlords in question and to "the superior landlords" mentioned in the express covenant:—

Held, (1) that the right which the landlords had purported to grant was a legal easement and was part of the demised premises to which the covenant for quiet enjoyment contained in the underlease related.

(2) That that qualified covenant displaced any covenant for title or quiet enjoyment implicit in the demise.

Line v. Stephenson (1838) 4 Bing.N.C. 678 and (1838) 5 Bing.N.C. 183 applied.

(3) *Semble*, that where there was a formal demise, it was unnecessary to imply an obligation to put the tenant into possession of the premises from the relationship of landlord and tenant, as was done in *Coe v. Clay* (1829) 5 Bing. 440 and *Jinks v. Edwards* (1856) 11 Exch. 775, for there was implicit in a demise a covenant for title and quiet enjoyment which extended to putting the tenant into possession of the premises leased to him at the outset of his term as well as entitling him to remain in possession thereafter.

Ludwell v. Newman (1795) 6 Term Rep. 458 applied.

In so far as the decisions in *Coe v. Clay* (supra), *Jinks v. Edwards* (supra) and *Wallis v. Hands* [1893] 2 Ch. 75; 9 T.L.R. 288 depended on the view that a covenant for quiet enjoyment could not be enforced before actual entry, they had been overruled, in effect, by section 149 (2) of the Law of Property Act, 1925.

(4) *Quaere* whether an obligation to put the tenant into possession, even if it was implied, could be applicable to the grant of an easement to use accommodation in common with others. In the

present case the tenant was put into possession of all that part of the subject-matter of the grant of which he was entitled to exclusive possession.

(5) That, even if such an obligation could and should be implied in a formal demise, it would be in *pari materia* with the implied covenant that the tenant should remain in possession thereafter, and it would, therefore, be displaced by an express covenant for quiet enjoyment, such as that in the underlease, which had displaced the covenant implied from the word "demise."

Accordingly the landlords were not in breach of covenant.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

The following statement of the facts is taken from the judgment of Romer L.J.

By a sub-underlease (hereinafter referred to as "the under-lease") dated February 6, 1950, the defendants granted a tenancy to the plaintiff in the following terms: "(1) The landlord hereby demises unto the tenant all those the four rooms or offices comprising the ground floor of the messuage or building known as Groveland House No. 12 Bow Churchyard in the City of London (hereinafter called 'the said premises') together with the landlords' fixtures and fittings in and about the said premises And together also with the right for the tenant to use in common with the landlords and superior landlords and all persons authorized by them and the other tenants of Groveland House aforesaid the lavatories on the first and second floors thereof and for that purpose and no other to pass and repass along the staircase leading from the said premises to the said lavatories To hold the same unto the tenant from the date hereof until June 18, 1961 yielding And paying therefor during the said term yearly and proportionately for any fraction of a year the clear yearly rent of £625 by equal quarterly payments in advance on the usual quarter days in every year the first of such payments being in respect of the period from the date hereof to March 25, 1950 to become due and payable on the date hereof And also paying as additional rent a sum equivalent to the annual premium required to insure two years rent of the said premises such additional rent to be paid on the quarter day next following the payment of such premium."

Clause 3 (3) of the underlease contained the following covenant for quiet enjoyment by the landlords: "That if the tenant shall duly pay the rent hereby reserved and shall duly perform and observe the covenants on the part of the tenant

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 1955 " and quietly hold and enjoy the said premises during the term
 ———— " hereby created without any interruption by the landlord or the
 MILLER " superior landlords or any person rightfully claiming under or
 v. " in trust for it or them."
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The " superior landlords " referred to in this subclause were the Englefield Trading Co. Ltd. This company had granted to the Emcer Products Ltd. on April 9, 1948, an underlease from March 25, 1948, until June 21, 1961, and the parcels thereby demised were precisely the same, including the right to use the lavatories on the first and second floors, as those comprised in clause 1 of the underlease of February 6, 1950. There were no lavatories in No. 12, Bow Churchyard, other than these two.

When the tenant entered into possession of the demised premises on March 1, 1950, he found that both lavatories were locked. He thereupon communicated with the landlords' agents, and as a result the first-floor lavatory was unlocked, and thenceforward the tenant had the use of it. It was, however, highly inconvenient for the tenant, whose staff consisted of both men and women, to have only one lavatory available, and arrangements were made whereby further lavatory accommodation was temporarily placed at his disposal in the adjoining building, No. 11, Bow Churchyard. He was, however, never able to make use of the lavatory on the second floor, which, as subsequently transpired, had been included in a very much earlier lease granted in 1939 under a title anterior to that of the Englefield Trading Co. Ltd. A firm of chartered accountants, Messrs. B. A. Smith & Son, were at all material times in possession of the premises comprised in the lease of 1939 under a title derived therefrom, and a partner in that firm said in evidence at the trial of the action that they always kept the second-floor lavatory locked, and that his firm and their employees had the exclusive use of it. He also said that they had, and exercised, the right, in common with others, to use the lavatory on the first floor. Having regard to the manifest inconvenience and trouble to which the tenant was put by his inability to exercise the right which had been granted to him by the underlease, to use the second-floor lavatory, he issued a writ on July 16, 1954, claiming damages for breach of the landlords' implied covenant for title.

By paragraph 3 (as amended) of his statement of claim the tenant pleaded his case as follows: " There was and is implied

“ in the said sub-underlease a covenant on the part of the defendants that they had and have a good right or title to demise to the plaintiff the right to use the said lavatories in common with the defendants and their superior landlords and all persons authorized by them and the other tenants of Groveland House aforesaid for the term granted by the said sub-underlease Further or alternatively there was and is implied in the said sub-underlease a covenant on the part of the defendants that they would put the plaintiff in possession or enjoyment of the right to use the said lavatories in manner aforesaid.”

By paragraph 4 the tenant alleged a breach by the landlords of the implied covenants mentioned in paragraph 3, and he claimed damages accordingly. The landlords' defence was, in substance, that their express covenant for quiet enjoyment in clause 3 (3) of the underlease excluded any such implied covenants as those alleged in paragraph 3 of the amended statement of claim. Danckwerts J. upheld this contention of the landlords and dismissed the tenant's action.

J. A. Plowman Q.C. and *H. E. Francis* for the tenant. The landlords were in breach of the implied obligation to put the tenant into possession of the premises demised at the commencement of the term: *Coe v. Clay*¹ and *Jinks v. Edwards*,² the principle being as stated by Woodfall on Landlord and Tenant, (1954) 25th ed., at p. 673. It would be odd if the landlords were not under any such obligation, or if a covenant for quiet enjoyment, which was prima facie intended for the benefit of the tenant, should enure for the benefit of the landlords by excluding obligations which would have otherwise been laid on them. In *Coe v. Clay*³ there was no demise but only an oral agreement. The obligation to put the tenant into possession of the subject-matter of the grant is something which is inherent in the relationship of landlord and tenant: it may be implied although the tenant has not been granted the right to exclusive possession: *Coe v. Clay*.³ It applies to a grant of a right such as this, to use a lavatory. The tenant is entitled to be put into possession of the rights granted to him whatever they may be. He can, as in *Coe v. Clay*,³ sue the landlords for breach of the obligation, he is not obliged to bring an ejectment against the person who is preventing him from exercising his right.

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¹ (1829) 5 Bing. 440.³ 5 Bing. 440.² (1856) 11 Exch. 775.

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[EVERSHED M.R. The landlords did not contract to give possession to the tenant of the lavatories, but only the right to use them. The tenant has been put into possession of all that the landlords contracted to give possession of.]

It is submitted that that is not so. The doctrine of *Coe v. Clay*³ and *Jinks v. Edwards*⁴ can be regarded as an illustration of a wider doctrine that whoever grants anything must be taken to grant also whatever is necessary for the enjoyment of the thing granted: *per* Lord Parker in *Pwllbach Colliery Co. Ltd. v. Woodman*.⁵ Applying that to this easement to use the lavatory, the landlords have granted to the tenant a term of years, and they are under an obligation to make the grant effective by enabling him to go into possession of the subject-matter of the grant. To perform that obligation the landlords ought at least to have given the tenant a key to the lavatory in circumstances which would have entitled him to use it. The landlords have failed to do that and there is, therefore, a breach of the obligation to make the grant effective. Once the right has been enjoyed, any subsequent obstruction of the right of user would be covered by a covenant for quiet enjoyment, but until the tenant is able to exercise the right, his remedy is the obligation recognized in *Coe v. Clay*.⁶

In the present case the reason why the tenant could not get the use of the lavatory was that before the date of the lease possession had been given to someone else. A covenant for quiet enjoyment only operates after the tenant is in possession and a landlord cannot be in breach of such a covenant until then: see *Ireland v. Bircham*.⁷ In *Ludwell v. Newman*⁸ it seems that the covenant for quiet enjoyment expressly extended to entry on the land. Possibly it was in the form given in *Platt on Covenants* in 1829 (at p. 312), some 30 years after. If so, that is the explanation for the decision that the covenant meant legal entry and enjoyment.

If the tenant fails to get possession his remedy must be on the implied obligation to give possession: see *Wallis v. Hands*.⁹

[EVERSHED M.R. It is doubtful whether Chitty J. meant to say that the covenant for quiet enjoyment did not apply as from the commencement of the term. The foundation for his remark was that at the relevant date all that the tenant had was an *interesse termini*.]

³ 5 Bing. 440.⁴ 11 Exch. 775.⁵ [1915] A.C. 634; 31 T.L.R. 271.⁶ 5 Bing. 440.⁷ (1835) 2 Bing.N.C. 90.⁸ (1795) 6 T.R. 458.⁹ [1893] 2 Ch. 75.

It is well settled that certain promises are to be implied on the part of the landlord by use of the word "demise," but where there is an express covenant for quiet enjoyment the implied covenant covering the same ground will be excluded: *Merrill v. Frame*¹⁰; *Malzy v. Eichholz*.¹¹ In *Line v. Stephenson*¹² it was pointed out that the covenant for title and for quiet enjoyment implied from the word "demise" are properly to be regarded as one single covenant and that, consequently, an express covenant for quiet enjoyment would exclude the implied covenant for title. But the decision in *Line v. Stephenson*¹² only applies to obligations implied from the word "demise" and does not touch the obligation recognized in *Coe v. Clay*¹³ and *Jinks v. Edwards*¹⁴ to put the tenant into possession at the commencement of the term, for that obligation is not dependent on there having been a demise. The covenant for quiet enjoyment implied in a demise is not in pari materia with the obligation to put the tenant into possession at the commencement of the term. They deal with different situations and both can exist side by side. In *Jinks v. Edwards*¹⁴ the obligation to put the tenant into possession was sued on although there must have been an implied covenant for quiet enjoyment: see *Bandy v. Cartwright*,¹⁵ in which it was decided that a covenant for quiet enjoyment was to be implied in a demise by parole (though not a covenant for title). Accordingly, the obligation implied in *Coe v. Clay*¹⁶ will not necessarily be negated by an express covenant which negatives the covenant implied in a demise.

[Reference was also made to Hill & Redman's Law of Landlord and Tenant (1955), 12th ed., para. 113, p. 178, and to *Cloake v. Hooper*¹⁷; *Holder v. Taylor*¹⁸ and *Nokes's case*.¹⁹]

If the express covenant was so worded that it extended to entry it would, of course, be impossible to contend that the obligation implied from the relationship of landlord and tenant (the *Coe v. Clay*²⁰ doctrine) was not then excluded, but that is not so here. The express covenant does not deal with this situation at all; it applies only in terms to the rooms on the ground floor and not to the lavatories, for although these were part of the demised premises they were not the "said premises" as

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¹⁰ (1812) 4 Taunt. 329.¹¹ [1916] 2 K.B. 308; 32 T.L.R. 506.¹² (1838) 4 Bing.N.C. 678; (1838)

5 Bing.N.C. 183.

¹³ 5 Bing. 440.¹⁴ 11 Exch. 775.¹⁵ (1853) 8 Exch. 913.¹⁶ 5 Bing. 440.¹⁷ (1673) Free.K.B. 122.¹⁸ (1614) Hob. 12.¹⁹ (1599) 4 Co.Rep. 80b.²⁰ 5 Bing. 440.

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defined in clause 1 (1) to which the covenant in clause 3 (3) is limited to apply. This is a landlord's covenant and it must, therefore, be construed strictly against them. The wording refers more naturally to the position after entry. In terms it is conditional on the performance by the tenant of his covenants, many of which can only be performed when he is in possession.

As the landlords have failed to fulfil the obligation placed on them by the grant, they must pay damages to the tenant. The measure of damages is based on the difference in value between what the landlords purported to grant and what the tenant in fact obtained.

J. G. Strangman Q.C. and *Denis S. Chetwood* for the landlords. The landlords are not responsible to the tenant for the damage, if any, which he has suffered. The covenant for quiet enjoyment applies from the commencement of the term and continues throughout: *Ludwell v. Newman*.²¹ This term began on February 6, 1950. If the landlords or anyone deriving title through them had locked the lavatories so that when the tenant entered on March 6 (by which time the covenant was indisputably in operation) he could not exercise his right to use them, there would have been a clear breach of the covenant contained in the lease. But neither this express covenant, nor the covenant for quiet enjoyment which is implied in a demise, covers interruption by persons claiming by title paramount.

The precise scope and import of the implied covenant for quiet enjoyment was uncertain until 1908 (see *Markham v. Paget*²²). As now understood the covenant arises not from the use of any particular words in the conveyance but from the relationship of landlord and tenant; it applies as from the commencement of the term and continues as long as that relationship subsists. The obligation to give possession at the outset of the term, recognized in *Coe v. Clay*²³ and *Jinks v. Edwards*,²⁴ also arises from that relationship and continues for the same period. The obligation is, in truth, an inherent and implicit part of the implied covenant.

[ROMER L.J. If so, why was not *Coe v. Clay*²⁵ framed on breach of the implied covenant for quiet enjoyment?]

At the time when *Coe v. Clay*²⁵ and *Jinks v. Edwards*²⁶ were decided it was uncertain whether a covenant for quiet enjoyment

²¹ 6 T.R. 458.²² [1908] 1 Ch. 697.²³ 5 Bing. 440.²⁴ 11 Exch. 775.²⁵ 5 Bing. 440.²⁶ 11 Exch. 775.

was to be implied in a parol letting. *Coe v. Clay*²⁷ is only shortly reported and does not clarify the position one way or the other. The agreement to let was there treated as an effective letting and as giving rise to the relationship of landlord and tenant: see the comment on *Coe v. Clay*²⁷ in *Drury v. Macnamara*,²⁸ which is cited in *Jinks v. Edwards*.²⁹ In both *Coe v. Clay*³⁰ and *Jinks v. Edwards*³¹ the lettings were informal and did not contain any express covenant, and it may well be that at that time it was thought that reliance could not be placed on an implied covenant for quiet enjoyment.

Whatever be the true basis of the doctrine in *Coe v. Clay*³² and *Jinks v. Edwards*,³³ there is a vital distinction between those cases and the present, for here the tenant is in possession. Further, in so far as the basis of the decisions in *Coe v. Clay*³⁴ and *Jinks v. Edwards*³⁵ depended on the view that a covenant for quiet enjoyment, whether express or implied, could not be asserted before actual entry, that basis has been taken away by section 149 of the Law of Property Act, 1925. Wolstenholme and Cherry, vol. I, at p. 496, comments that that provision has overruled *Wallis v. Hands*³⁶ on this point. It is now clear that the covenant for quiet enjoyment operates throughout the term and does not depend on entry.

It is not altogether clear how Lord Campbell's comment³⁷ on *Coe v. Clay*³⁸ that the interest operated as a lease is reconcilable with what Chitty J. said in *Wallis v. Hands*³⁹ about that case, possibly the letting operated as an immediate demise of an *interesse termini*.

[EVERSHED M.R. It would be dangerous to give too much weight to Chitty J.'s remarks, because his attention was not drawn to *Ludwell v. Newman*.⁴⁰]

In the absence of an express covenant, two covenants, or one with two branches, are implied in a demise. First, that the lessor has title to give and will give possession, and second, that the tenant will have and enjoy that possession without disturbance by the landlord or anyone claiming through him. The obligation to put into possession may perhaps be regarded as falling most naturally within the implied covenant for title, but

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²⁷ 5 Bing. 440.²⁸ (1855) 5 E. & B. 612.²⁹ 11 Exch. 775.³⁰ 5 Bing. 440.³¹ 11 Exch. 775.³² 5 Bing. 440.³³ 11 Exch. 775.³⁴ 5 Bing. 440.³⁵ 11 Exch. 775.³⁶ [1893] 2 Ch. 75.³⁷ 5 E. & B. 612, 617.³⁸ 5 Bing. 440.³⁹ [1893] 2 Ch. 75.⁴⁰ 6 T.R. 458.

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it cannot be said that it is not also covered by the covenant for quiet enjoyment. It is inherent in both. Whatever the scope and extent of the implied covenants, both are cut out by any express covenant for quiet enjoyment, however limited or qualified: *Line v. Stephenson*.⁴¹ Even if the express covenant is specifically limited to operate only after the lessee is in occupation it will still displace the implication arising from the demise, which would have compelled the landlord to put the tenant into possession.

Tortious acts, except of the landlord himself or of persons claiming through him, are not within either the express or the implied covenant. [Reference was made to *Nokes'* case⁴² and to *Clayton v. Leech*.⁴³]

[EVERSHED M.R. It was there said that the lessee could investigate his lessor's title, but it is notorious that he cannot do that in the absence of special stipulation. The lessee in this case might, however, have discovered the position by inspection of the premises.]

The right granted to the tenant to use the lavatories was an easement to be enjoyed as appurtenant to the premises. The landlords were passing on to the tenant what they had, according to the terms of their underlease. It now appears that they could not impose the right on the servient tenement, but the question whether this creates an easement or not cannot depend on whether the landlords had in fact the title to grant. The right was to be enjoyed in common with others, but that does not negative the possibility that this was an easement. *Copeland v. Greenhalf*⁴⁴ does not apply.

This was an express grant of an easement, not a contract to make a grant in the future. The "said premises" to which the covenant in the lease applies is the whole subject-matter of the demise, that is the offices and the right to use the lavatories. If that is not so, and the express covenant does not cover the right to use the lavatories, it is difficult to see how the tenant could succeed on the claim as pleaded. He might perhaps have succeeded on a claim for breach of warranty. [Reference was also made to *Murphy v. Bandon Co-operative Society*.⁴⁵]

Denis S. Chetwood following. If the right to use the lavatories on the second floor conferred by the underlease was a

⁴¹ 4 Bing.N.C. 678; 5 Bing.N.C. 183.

⁴² 4 Co.Rep. 80b.

⁴³ (1889) 41 Ch.D. 103.

⁴⁴ [1952] Ch. 488; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809.

⁴⁵ [1909] 2 I.R. 510 (affirmed [1911] 2 I.R. 631).

legal easement the other difficulties of the case disappear. There are two alternative constructions possible of the underlease: first, that the right granted was merely a right to use the apparatus of the lavatory; second, that it was a right to use the room for the purpose for which it was designed. The latter is the true construction. The grant was a right of user for a limited purpose. That right did not deprive the owner of the second floor of the use of the lavatory, subject to his not interfering with the rights of other persons. For example, he could pass pipes through it. The fact that the right of user involves the exclusion of the owner while it is exercised does not prevent the right being an easement. The right does not confer an exclusive right of user and is not within the principle applied in *Copeland v. Greenhalf*.⁴⁶ If the right granted is a legal easement, the tenant has no remedy under the covenant for title because the right claimed by the owner of the second floor was not acquired from the landlord. The fact that the tenant has no redress is not here a hardship. He allowed four years to elapse before he took any steps in the matter and he has got the use of alternative lavatories. The landlords have done all that they can do. There is no remedy open to the tenant. The doctrine of caveat emptor applies to the grant of a lease. The landlords have no claim against their superior landlord.

The right to use the second-floor lavatories was a legal easement demised with the ground-floor premises. The right was not conferred as a matter of contract. There is no modern authority on the point, but it is submitted that a covenant for quiet enjoyment does not apply to incorporeal hereditaments: but see Woodfall, *Landlord and Tenant*, (1954) 25th ed., p. 682, para. 1556. The maxim *ut res magis valeat quam pereat* has no application. If a landlord has no title to the subject-matter of the demise at the time of the grant and he subsequently obtains a good title, he is estopped from saying that at the time of the grant he had not got the necessary interest to support the grant.

The doctrine laid down in *Coe v. Clay*⁴⁷ was developed at a time when the doctrine of *interesse termini* was in operation and a lessee could not sue on the relationship of landlord and tenant until possession had been granted, and the covenant for quiet enjoyment would not then have extended to an obligation to put the lessee in possession. [Reference was made to Woodfall's *Landlord and Tenant*, (1954) 25th ed., p. 670, para. 1529.]

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⁴⁶ [1952] Ch. 488.⁴⁷ 5 Bing. 440.

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J. A. Plowman Q.C. in reply. As the landlords had no proprietary interest in the second-floor lavatories they could not grant any such interest therein, and on the true construction of the underlease the right granted was one in contract. The covenant for quiet enjoyment only extends to the ground-floor premises which were defined as the demised premises. The additional rights conferred by the underlease were not included in that definition. As a matter of construction the covenant for quiet enjoyment did not extend to the lavatories. The question is: what is the nature of the right granted in respect of the lavatories? These rights were and can only take effect as contractual rights.

The covenant for quiet enjoyment is ambiguous and should be construed in favour of the tenant. The principle of *Coe v. Clay*⁴⁷ imposes an additional obligation which has an independent existence apart from the covenant for quiet enjoyment. [Reference was made to Halsbury's Laws of England, 2nd ed., vol. 22, p. 514.] *Smart v. Jones*⁴⁸ is on a different point. In *Jinks v. Edwards*⁴⁹ the obligation to put the tenant into possession was treated as existing apart from the covenant for quiet enjoyment. All that *Line v. Stephenson*⁵⁰ decided was that an express covenant for quiet enjoyment excluded any implied covenant. The word "demise" is a technical word and implies a covenant for title and for quiet enjoyment but not an obligation to put the tenant in possession on the *Coe v. Clay*⁵¹ principle.

[Reference was made to Woodfall's Landlord and Tenant, (1954) 25th ed., p. 673, para. 1534; *Line v. Stephenson*⁵²; Norton on Deeds, (1928) 2nd ed., pp. 601, 602.]

The fact that the doctrine of *interesse termini* was abolished by section 149 (2) of the Law of Property Act, 1925, does not affect the application of the *Coe v. Clay*⁵³ principle, for the reasoning in *Wallis v. Hands*⁵⁴ was not based on the technical consideration of the doctrine of *interesse termini* but on the theory that the covenant for quiet enjoyment and the obligation recognized in *Coe v. Clay*⁵⁵ are mutually exclusive, the one operating only after the tenant is in possession and the other until then.

Cur. adv. vult.

⁴⁷ 5 Bing. 440.

⁴⁸ (1864) 15 C.B.N.S. 717.

⁴⁹ 11 Exch. 775.

⁵⁰ 4 Bing.N.C. 678; 5 Bing.N.C. 183.

⁵¹ 5 Bing. 440.

⁵² 4 Bing.N.C. 678; 5 Bing.N.C. 183.

⁵³ 5 Bing. 440.

⁵⁴ [1893] 2 Ch. 75.

⁵⁵ 5 Bing. 440.

Dec. 20. EVERSLED M.R. In this case I have had the advantage of reading in advance the judgment which Romer L.J. has prepared. I agree with it, and do not desire to add anything of my own.

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BIRKETT L.J. I, too, have had the same opportunity, and I make the same observations as those made by my Lord.

ROMER L.J. This is an appeal from an order of Danckwerts J. whereby he dismissed the plaintiff's action against the defendants, who are his landlords, for damages for an alleged breach of covenant. [His Lordship stated the facts, as set out above, referred to the issue of the writ and the pleadings, and continued:] The plaintiff could not, of course, sue on the covenant for quiet enjoyment which was contained in the underlease, for that covenant was in a qualified form and limited the defendants' liability to interruption by themselves or the Englefield Trading Co. Ltd., or persons claiming under them or it, and Messrs. Smith, who claimed under a paramount title, were not within this category of persons.

Before turning to the principal questions of law which were argued before us, it is convenient to deal with two preliminary matters, namely, as to the legal quality of the right granted by the underlease to use the lavatories, and as to whether this right formed part of "the said premises" to which the lessors' covenant for quiet enjoyment related.

As to the first point, it was suggested that, inasmuch as the lessors had no title to grant to the tenant the right to use the lavatory on the second floor of the premises, the purported grant of this right amounted to no more than an agreement to grant a licence or an easement, and that the plaintiff is entitled to damages for breach of this agreement. This way of presenting the case was not in fact pleaded in the statement of claim, but I am, in any case, unable to accept it. In my opinion it is impossible to construe the express grant to use the lavatories as a contract to make a grant in the future merely because it subsequently transpired that the lessors had no title. The lessors thought that they were in a position to grant this right and unequivocally attempted to do so, and no question of an agreement to grant some interest in the future arises; nor, in my opinion, is any such agreement to be implied in law. The question remains, however, as to the nature of the right which the lessors purported to include in the demise, and, in particular,

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was it a licence or was it an easement? In my judgment the right had all the requisite characteristics of an easement. There is no doubt as to what were intended to be the dominant and servient tenements respectively, and the right was appurtenant to the former and calculated to enhance its beneficial use and enjoyment. It is true that during the times when the dominant owner exercised the right, the owner of the servient tenement would be excluded, but this in greater or less degree is a common feature of many easements (for example, rights of way) and does not amount to such an ouster of the servient owner's rights as was held by Upjohn J. to be incompatible with a legal easement in *Copeland v. Greenhalf*.¹ No case precisely in point on this issue was brought to our attention, but the right to use a lavatory is not dissimilar, I think, to the right to use a neighbour's kitchen for washing, the validity of which as an easement was assumed without question in *Heywood v. Mallalieu*.² No objection can fairly be made based upon uncertainty, and it follows, in my judgment, that the right may properly be regarded as an easement which the lessors were professing to grant for a term of years; and such an easement would rank as an interest in or over land capable of being created at law by virtue of section 1 (2) of the Law of Property Act, 1925.

The next question is whether this easement which the lessors purported to grant is within the covenant for quiet enjoyment in clause 3 (3) of the underlease, and this depends upon whether it comes within the words "the said premises" as therein used. The appellant contends that it does not, on the ground that by clause 1 of the underlease it is only the four rooms or offices comprising the ground floor of No. 12, Bow Churchyard which are "hereinafter called 'the said premises,'" and that the right to use the lavatories is accordingly excluded from that phrase when it appears in clause 3 (3). If so, it would follow that the landlords' fixtures and fittings, which were included in the demise, would be similarly excluded. In my opinion, however, "the said premises" in clause 3 (3) include the whole subject-matter of the demise, notwithstanding the definition which appears in clause 1. Although many of the provisions of the underlease related only to the rooms or offices, and it was therefore convenient to refer to them under the compendious description of "the said premises," that phrase as used in other contexts (for example, in the provision for payment of additional

¹ [1952] Ch. 488; [1952] 1 T.L.R. 786; [1952] 1 All E.R. 809.

² (1883) 25 Ch.D. 357.

rent at the end of clause 1) requires an interpretation co-extensive with the whole subject-matter of the underlease; and I have little doubt but that such an interpretation should be put upon the phrase in clause 3 (3). In my judgment, accordingly, the easement which the defendants purported to grant to the plaintiff in relation to the lavatories is within the covenant for quiet enjoyment.

These conclusions being then adverse to the appellant, Mr. Plowman's main argument on his behalf may be summarized in brief as follows: (1) The lessors were under an obligation (to be implied from the relationship of landlord and tenant) to put the tenant into possession of the premises demised. (2) These premises included the easement to use the lavatories. (3) The obligation remains unaffected by the express covenant for quiet enjoyment in clause 3 (3) of the underlease. (4) The lessors have failed to fulfil the obligation, and must therefore pay damages to the plaintiff.

As to the first point, the appellant founds himself on the principle of law which is stated in Woodfall on Landlord and Tenant, (1954) 25th ed., at p. 673, in the following terms: "Where "there is an *actual demise* for one year or more, the lessor "impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so, by reason of a "previous tenant wrongfully holding over, the lessee may recover "damages, and is not driven to bring ejectment against the "previous tenant." This passage (to which the judge himself referred in his judgment) receives undoubted support from the two cases to which the author refers, *videlicet*, *Coe v. Clay*³ and *Jinks v. Edwards*.⁴ In the former of these cases the defendant had agreed to let to the plaintiff certain premises per verba de praesenti, and the plaintiff, being unable to get possession because a preceding occupier wrongfully refused to quit, sued the defendant for damages. The defendant's case was that as the plaintiff had an interest upon which he might have brought an ejectment, he had shown no breach by the defendant. A verdict was, however, found for the plaintiff, and the Court of Common Pleas refused a motion to set it aside. "The court," says the reporter, "were all clearly of opinion, that he who lets, agrees to give "possession, and not merely to give a chance of a law suit."

In *Jinks v. Edwards*⁴ by an agreement in writing the defendants agreed to let to the plaintiff certain premises for one year from September 29, 1854, and so on from year to year. The

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³ (1829) 5 Bing. 440.

⁴ (1856) 11 Exch. 775.

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plaintiff sued the defendants, alleging a failure or refusal by them to give or let the plaintiff into possession on the agreed date or subsequently. The defendants demurred on the ground that the agreement did not contain any contract on the part of the defendants to give the plaintiff possession of the premises. The authority of *Coe v. Clay*⁵ to the effect that every person who lets premises impliedly undertakes to give possession of them was challenged by Serjeant Hayes in supporting the demurrer. "That doctrine," he argued,⁵ "cannot be supported. In *Drury v. Macnamara*⁶ Lord Campbell C.J. points out that the "foundation of the judgment in *Coe v. Clay*⁷ was that the "instrument operated as a lease," and Baron Alderson interjected: "It is the same here." The court held that the case of *Coe v. Clay*⁷ was directly in point, and that there must be judgment for the plaintiff.

It appears to me, apart altogether from other considerations, to be highly questionable whether the principle which governed these two cases can have any application to an easement such as the right to use lavatory accommodation in common with other people. The principle is readily intelligible in relation to property such as a dwelling-house and land which are let to a tenant, for so long as some third party insists on occupying the property or some material part thereof the tenant is either wholly or partially ousted from the exclusive possession to which, under his tenancy, he is *prima facie* entitled.

In the present case, however, the plaintiff was in fact put in exclusive possession of all that part of the subject-matter of the grant to the exclusive possession of which he was, by the terms of the grant, entitled. In the case, however, of a right merely to share the use of a part of premises—be it the lavatory, bathroom, kitchen, or any other room—no question of exclusive possession can arise, and therefore the landlord is neither able nor obliged to put his tenant in sole possession of that part at the beginning of the tenancy. It is, however, unnecessary to express a concluded view upon this point, for the principle of *Coe v. Clay*⁷ does not, in my judgment, apply to the present case for an altogether different reason.

It has long been established that, if a lessor demises property to a tenant and enters into no express covenants for title or for quiet enjoyment, certain promises are implied by him by force of the word "demise," namely, that he is entitled to grant

⁵ 5 Bing. 440.⁷ 5 Bing. 440.⁶ (1855) 5 E. & B. 612.

some term in the demised premises, and that the lessee shall have quiet enjoyment of the premises; *Burnett v. Lynch*⁸; *Hart v. Windsor*.⁹ It was pointed out in *Line v. Stephenson*¹⁰ that these promises are more properly to be regarded as embodied in one single implied covenant, and that this covenant may be broken either by want of title or by the eviction of the tenant. It was also, however, decided in *Line v. Stephenson*¹⁰ that there is no room for the implication of the covenant in a demise if the lessor enters into an express covenant for quiet enjoyment. The reason for this is that an express covenant as to one branch of the covenant implied by the word "demise" excludes the other on the principle *expressio unius est exclusio alterius* (*per Lord Abinger*¹¹).

Accordingly, in the underlease now in question, there can be no implied covenant by the defendants either as to title or for quiet enjoyment. Mr. Plowman, for the appellant, conceded this, but he contended that the implied promise by a lessor to put his tenant into possession at the commencement of the tenancy, which was recognized in *Coe v. Clay*,¹² has an existence of its own which is independent of the covenant either for title or for quiet enjoyment, and which is accordingly unaffected by the principle of *Line v. Stephenson*.¹³ Mr. Plowman argued in the alternative that that principle only displaces implied covenants which are in *pari materia* with covenants for title and for quiet enjoyment, and that such cannot be said of the obligation in *Coe v. Clay*.¹⁴ As to the former of these submissions, he relied on a passage in the judgment of Chitty J. in *Wallis v. Hands*.¹⁵ In that case the plaintiff in 1887 took a lease of certain minerals which, to his knowledge, had already been included in a lease to other parties which had been granted in 1884. The plaintiff never entered into possession under the lease of 1887, although it purported to be a lease in possession, and in 1888 the lessees of the lease of 1884 assigned the term thereby demised. The plaintiff then brought an action against the assigns in order to establish the priority of his own title over them and against his lessor on the implied covenant for quiet enjoyment, for the lease of 1887 contained no express covenant in that behalf. Chitty J. held that in the circumstances the plaintiff had no more than an *interesse termini*, and accordingly could

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⁸ (1826) 5 B. & C. 589, 609.¹² 5 Bing. 440.⁹ (1844) 12 M. & W. 68, 85.¹³ 4 Bing.N.C. 678; 5 Bing.N.C.¹⁰ (1838) 4 Bing.N.C. 678; 5 Bing. 183.

N.C. 183.

¹⁴ 5 Bing. 440.¹¹ 5 Bing.N.C. 184.¹⁵ [1893] 2 Ch. 75.

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not maintain an action on the implied covenant. The decision on this point has, in effect, been overruled by section 149 of the Law of Property Act, 1925, which abolished the doctrine of *interesse termini*. In so far, therefore, as the decisions in *Coe v. Clay*¹⁶ and *Jinks v. Edwards*¹⁷ may have depended on the view that any covenant for quiet enjoyment, whether express or implied, could not be asserted by a tenant before actual entry, the basis of the decisions has been taken away by the Law of Property Act, since it is provided in terms by section 149 (2) of that Act that a lease operates from the date fixed for commencement of the term without actual entry.

But in the course of his judgment on this matter Chitty J. expressed himself as follows¹⁸: “The law provides a person “having an *interesse termini* with an adequate remedy against “the granter of the term, without there being any necessity to “have recourse to an action on the covenant for quiet enjoyment; he can bring an action against the granter of the term “for not putting him in possession:—see *Coe v. Clay*¹⁹ and *Jinks v. Edwards*.²⁰ This right of action is also founded on implied “covenant. The present action is not to enforce any such right; “nor are there any facts proved which would give rise to it.” Mr. Plowman submits accordingly on that that the judge was expressing the view that the *Coe v. Clay*²¹ obligation (if I may so describe it) has in any event a distinct operation from that of the covenant for quiet enjoyment, and imposes upon the lessor a liability separate from that which arises under the latter covenant. The isolation and independence of the obligation from the implied covenant for title and quiet enjoyment appears indeed also to be recognized in some of the textbooks (see, for example, Halsbury’s Laws of England, 2nd ed., vol. 20, pp. 242, 243, and Hill & Redman’s Law of Landlord and Tenant (1955), 12th ed., para. 113, p. 178). This view would also appear to receive support at first sight from the fact that in neither *Coe v. Clay*²¹ nor in *Jinks v. Edwards*²² did the tenants claim relief under either an implied covenant for quiet enjoyment or an implied covenant for title; in each case they rested their claim upon the duty of a landlord, implicit in the relationship into which he enters with his tenant, to put the tenant into possession at the beginning of the tenancy; and it was upon that ground and no

¹⁶ 5 Bing. 440.¹⁷ 11 Exch. 775.¹⁸ [1893] 2 Ch. 75, 85.¹⁹ 5 Bing. 440.²⁰ 11 Exch. 775.²¹ 5 Bing. 440.²² 11 Exch. 775.

other that the court awarded damages. I think, however, that even apart from the question, already mentioned, of suing on the covenant for quiet enjoyment before entry, this point is sufficiently answered by the fact that in neither of these cases was a formal lease executed by the landlord; in *Coe v. Clay*²³ the letting was oral, and in *Jinks v. Edwards*²⁴ the tenancy arose out of an agreement for a lease. It was held in *Bandy v. Cartwright*,²⁵ and had for long been the law, that no covenant for title is implied in oral lettings. The question whether a covenant for quiet enjoyment should be implied in parol lettings and in mere agreements was an uncertain one over a period of many years, and it was not until *Markham v. Paget*²⁶ that Swinfen-Eady J., after a review of the authorities, decided definitely that it should.

In these circumstances it may well be that the actions in *Coe v. Clay*²⁷ and *Jinks v. Edwards*²⁸ were not brought or decided upon an implied covenant for quiet enjoyment or title because it was thought that no such implication existed or could be relied upon in view of the informal character of the lettings which were there in question. For myself, I do not think that there is any ground for implying the *Coe v. Clay*²⁹ obligation in addition to the covenant for title and quiet enjoyment which is implicit in a formal instrument of demise or grant. By the very force of the liability which is imposed on a lessor under the covenant for quiet enjoyment the tenant is entitled to be put into possession of the premises which are leased to him at the outset of his tenancy (*Ludwell v. Newman*³⁰) and to remain quietly in possession thereof throughout the term. Mr. Plowman relied on the statement by Chitty J. in *Wallis v. Hands*³¹ that "the essence of a breach of covenant for quiet enjoyment in a lease appears to me to be a disturbance of the lessee's possession." I do not, however, think that Chitty J. was intending to say that the covenant does not begin to operate until the tenant has obtained possession, for it is quite clear that it operates from the moment when the demised term starts to run.

There is, in my opinion, no necessity, therefore, for implying the *Coe v. Clay*³² obligation in a formal demise, and I would

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²³ 5 Bing. 440.²⁴ 11 Exch. 775.²⁵ (1853) 8 Exch. 913.²⁶ [1908] 1 Ch. 697; 24 T.L.R.²⁷ 5 Bing. 440.²⁸ 5 Bing. 440.

1 Ch. 1956.

²⁸ 11 Exch. 775.²⁹ 5 Bing. 440.³⁰ (1795) 6 Term Rep. 458.³¹ [1893] 2 Ch. 75, 84.³² 5 Bing. 440.

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accordingly have felt considerable difficulty in implying it in the underlease even if no express covenant for quiet enjoyment had been incorporated. Even, however, if I am wrong in that, I am quite clear that any such implication is excluded by reason of this express covenant on the principle of *Line v. Stephenson*.³³

Mr. Plowman rightly said (and this was his alternative way of putting the point) that an express covenant will operate only to displace an implied covenant if they both cover the same ground—or, in other words, if they are in *pari materia* (Norton on Deeds (1928), 2nd ed., p. 601). This is true, but it appears to me, as I have already indicated, that the purpose of the *Coe v. Clay*³⁴ obligation is fully covered by the covenant for quiet enjoyment which is implied from the word “demise.” Such a covenant entitles the tenant to be put into possession as well as to remain in possession thereafter, and this is exactly the purpose of the obligation which was implied in *Coe v. Clay*.³⁴ In any case I find it impossible to regard a covenant to put the lessee in possession at the beginning of the term as being otherwise than in *pari materia* with a covenant that he should remain in possession thereafter. It was not suggested that the form of the express covenant in clause 3 (3) of the underlease is of narrower scope than a covenant for quiet enjoyment which is implied from the word “demise,” and it accordingly follows that this covenant also answers the purpose of the obligation in *Coe v. Clay*.³⁴

In these circumstances it is not possible, as I think, successfully to contend that if, contrary to my own view, the obligation upon which the appellant relies can be incorporated by implication in a formal lease, it can survive the eliminating effect of an express covenant for quiet enjoyment such as that which is contained in the underlease.

In my judgment, accordingly, the learned judge came to a correct conclusion in this case, and the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. G. Bosman, Robinson & Co.; Herbert Smith & Co.*

E. D.

³³ 4 Bing.N.C. 678; 5 Bing.N.C. 183. ³⁴ 5 Bing. 440.

In re CLAIM BY HELBERT WAGG & CO. LTD.

- Conflict of Laws — Movables — Assignment — Foreign legislation—Validity—Foreign exchange legislation—Whether confiscatory—German Moratorium Law of 1933—Debt payable in London made payable to Konversionskasse in Reichsmarks—German law proper law of contract.*
- Conflict of Laws—Chose in action or debt—Situs—Debtor's place of residence—No situs until debt payable.*
- Conflict of Laws—Contract—Proper law—Contract to be “construed in accordance with *x* law”—*x* proper law.*
- Trading with the Enemy—Loan before war—Enemy debtor—Whether contract abrogated.*
- Trading with the Enemy—Administrator of Enemy Property—Appeal from decision—Whether decision of Administrator on effect of German law final—Distribution of German Enemy Property Act, 1949 (12, 13 & 14 Geo. 6, c. 85)—Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951, No. 1899), art. 7 (2).*
- Contract—Conflict of laws—Debt—No local situation until payable—Governed by proper law—Moratorium law—Whether confiscatory.*

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May 25,
26, 27;
Oct. 11, 12,
13, 14,
18, 19;
Dec. 8.

Upjohn J.

By a loan agreement made on December 19, 1924, between a German company (“the company”) of the one part and an English company (“the claimant”) of the other part, the claimant agreed to create a sterling loan of £350,000 with interest at 7½ per cent. Clause 2 of the agreement provided that the principal and interest should be paid in sterling in London free from all German taxes, and clause 5 provided that the loan should be secured by a specific mortgage upon certain coalfields in Germany belonging to the company.

Clause 12 provided: “This agreement shall be construed in accordance with German law. An English and German text have been drawn up, but the parties agree that in the event of any conflict between the English and German texts, the English text shall prevail . . .”

The loan was duly made and the company discharged its obligations thereunder until 1933, when the German Moratorium Law of June 30 was passed in an honest attempt to solve Germany's economic position. That law provided that a Konversionskasse for foreign debts would be created, that debts payable in foreign currencies must be converted into Reichsmarks and paid into the Konversionskasse, the debtor's liability to the creditor being discharged thereby.

The company duly paid Reichsmarks into the Konversionskasse at the appropriate rate of exchange, and continued to do so after the outbreak of war between Great Britain and Germany in 1939, and by 1945 the company had paid the full equivalent in Reichsmarks of the whole loan outstanding and interest thereon.

On September 3, 1939, there was outstanding under the loan agreement £174,142 in respect of capital, and the claimant

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claimed, under the provisions of the Distribution of German Enemy Property Act, 1949,¹ and the orders made thereunder, to rank as creditor in respect of that amount and interest thereon.

¹ Distribution of German Enemy Property Act, 1949, s. 1: "(1) His Majesty may by Order in Council 'make provision for the collection and realization of German enemy property and for the distribution of the proceeds thereof, to such extent as may be prescribed by the Order, to persons who establish claims in respect of German enemy debts. (2) Without prejudice to the generality of the preceding subsection, an Order in Council under this section may make provision as to the following matters:—(a) the appointment by the Board of Trade of an administrator for the purposes of the Order, and the conferring and imposing on that administrator of such powers and duties as may be prescribed by the Order; . . . (d) the determination, as respects any such claim, of the question whether the claim is established for the purposes of the Order and the amount of the claim. . . . (3) The administrator appointed under this section shall be a corporation sole under the name of the Administrator of German Enemy Property, and is in this Act referred to as 'the administrator' . . ."

S. 8: "(1) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say—'German enemy debt' means—(a) any sum due at the passing of this Act [December 16, 1949] in respect of an obligation incurred before the third day of September, nineteen hundred and thirty-nine, which on that day was an obligation of any of the following persons—. . . (iii) any body of persons (whether corporate or unincorporate) which on that day was a body incorporated or constituted

"under the laws in force in the United Kingdom; . . ."

Distribution of German Enemy Property (No. 2) Order, 1951, Art. 3: "This Order shall not apply—. . . (b) to any claim in respect of a German enemy debt falling within section 8 (1) (a) of the Act due at the relevant time to a company incorporated in the United Kingdom whose activities in the United Kingdom on the 3rd day of September, 1939, were confined to complying with the requirements of the Companies Act, 1929 . . . and to distributing profits earned abroad; . . ."

Art. 7 (1): "The administrator shall determine whether any claim is established for the purposes of this Order and the amount for which it may be admitted for payment, and shall serve written notice of the determination on the claimant. (2) The determination of the administrator in relation to any claim shall be final: Provided that the claimant, if dissatisfied with the determination as being erroneous in point of law, may by notice in writing given within six weeks after being served with notice of determination as aforesaid and setting out the question or questions of law in respect of which it is alleged that the determination of the administrator was erroneous, require the administrator to state and sign a case for the opinion thereon of the High Court and the decision of the High Court shall be final. (3) The administrator shall be entitled to appear at the hearing of any case stated by him under this Article. (4) If the question at issue between a claimant and the administrator falls to be decided according to the law of Scotland, the reference to the High Court shall be construed as a reference to the Court of Session. (5) If the question at issue . . . falls to be decided according to the law of Northern Ireland the reference to

The Administrator of German enemy property, in rejecting the claim, held that the contract was governed by German law and that the company's payments to the Konversionskasse had the effect under the municipal law of Germany then in force, namely, the Moratorium Law of 1933, of discharging all liabilities of the company in respect of the loan both as to capital and interest.

The claimant appealed. At the hearing of the appeal the claimant sought to question the administrator's decision (a) on the assumption that he was right in his determination as to the domestic effect of the Moratorium Law, and (b) in the alternative, on the ground that it was entitled to adduce further evidence to support its contention as to the true intent and effect of that law:—

Held (dismissing the appeal), (1) that by virtue of clause 12 of the agreement German law, as it existed from time to time, was the proper law of the contract.

Vita Food Products Inc. v. Unus Shipping Co. Ltd. [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513 applied.

(2) That the question whether the court would recognize the validity of the Moratorium Law depended on the proper law of the contract and not the situs of the debt.

Jabbour v. Custodian of Israeli Absentee Property [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145 distinguished.

(3) That in any event the locality of the debt was in Germany, since that was the only place where the debtor resided, although the debt was payable under the contract in London.

Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou (unreported, C.A., 1931) followed.

New York Life Insurance Co. v. Public Trustee [1924] 2 Ch. 101; 40 T.L.R. 430 considered.

(4) That in general every State has power to legislate in respect of movables situate within it and contracts governed by its law unless (inter alia) the legislation aims at confiscating the property of particular individuals or classes of individuals, but that confiscation without any adequate compensation is not per se a ground for refusing recognition to foreign legislation.

Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co. [1921] 3 K.B. 532; 37 T.L.R. 777 and *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718; 45 T.L.R. 365 applied.

Anglo-Iranian Oil Co. v. Jaffrate [1953] 1 W.L.R. 246 considered.

(5) That effect must be given to a measure of foreign exchange

"the High Court shall be construed
"as a reference to the High Court of
"Justice in Northern Ireland. (6) If
"the question at issue . . . falls to be
"decided according to the law of
"Jersey, the reference to the High
"Court shall be construed as a refer-
"ence to the Superior Number of the
"Royal Court of Jersey. (7) If the
"question at issue . . . falls to be
"decided according to the law of the

"Bailiwick of Guernsey, the refer-
"ence to the High Court shall be
"construed as a reference to the Royal
"Court of Guernsey. (8) If the ques-
"tion at issue . . . falls to be decided
"according to the law of the Isle of
"Man, the reference to the High
"Court shall be construed as a refer-
"ence to His Majesty's High Court
"of Justice of the Isle of Man,
"Chancery Division."

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control where the law of the foreign State is the proper law of the contract or the movable is situate within its territorial jurisdiction, provided the law was passed with the genuine intention of protecting its economy in times of national stress, although for that purpose it regulated (*inter alia*) the rights of foreign creditors; and that the Moratorium Law was such foreign exchange control legislation which must be recognized, since the proper law of the contract was German.

Kahler v. Midland Bank Ltd. [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621 applied.

(6) That on the outbreak of war the contract, though suspended, was not abrogated, as it was wholly executed on the part of the claimants, and involved no intercourse between subjects and alien enemies or increase of enemy resources.

Schering Ltd. v. Stockholms Enskilda Bank [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36 applied.

(7) That under the terms of the Distribution of German Enemy Property (No. 2) Order, 1951, the decision of the administrator as to the effect of German law on the provisions of the contract was a question of fact and was final, so that the claimants could not adduce evidence to controvert it.

CASE STATED by the Administrator of Germany Enemy Property under the provisions of the Distribution of Germany Enemy Property Act, 1949.

The facts are taken substantially from the judgment.

By a loan agreement made on December 19, 1924, between a German company under its then name of Rombacher Hüttenwerke ("the company") of the one part, and Helbert Wagg & Co. Ltd. ("the claimant") of the other part, the claimant agreed to create a sterling loan of £350,000, carrying interest at $7\frac{1}{2}$ per cent. payable half-yearly. The claimant agreed to make the said loan at a discount of $3\frac{1}{2}$ per cent., and by clause 2 it was provided that the principal and interest should be paid in sterling free from all German taxes in London. It was further provided by clause 3 that the principal should be redeemed by an annual cumulative sinking fund beginning in 1925, and calculated to redeem the whole loan by January, 1945, the payments being made in accordance with schedule I to the loan agreement.

Clause 5 provided that the loan should be secured by a specific mortgage on certain coalfields in Germany belonging to the company. In addition, by clause 6, the company agreed to pay to the claimants a royalty for each ton of coal produced by the company's coalfields during the currency of the loan.

By clause 8 the company undertook, when called on to do so by the claimants, to issue bearer bonds for the loan, the claimants undertaking to pay any German stamp duty on such bonds. The

bonds were to be secured by a trust deed and they were to conform to the usual text and practice ruling in the City of London.

By clause 3 it was contemplated that the loan might become a public loan with quotations in London, New York, Berlin and Amsterdam Stock Exchange, and clause 12 was in these terms:

“ This agreement shall be construed in accordance with German law. An English and German text have been drawn up, but the parties agree that in the event of any conflict between the English and German texts, the English text shall prevail with the exception of clause 10, paragraph 2.”

The loan was duly made and the company discharged its obligations thereunder until 1933, when the matter was complicated by the passing of a German moratorium law on June 30 of that year.

The relative part of the moratorium law was in these terms:

“ 1. (1) Interests, dividends and regular redemptions, rent and similar regularly recurring satisfaction of obligations resulting from credits, loans, mortgages, etc., must be paid into the Konversionskasse if the amount is due and payable in Reichsmark. If the debtor has to pay in foreign currency the amount must be converted into Reichsmark according to the official middle price of the Berlin Stock Exchange, valid on the working day preceding the day of payment. . . . (2) As far as the debtor has paid into the Konversionskasse he is discharged from his liability. The relationship between the Kasse and the creditor is defined by section 3. (3) The provisions of subparagraph (1) do not apply if the property, credit, loan, mortgage, land mortgage, participation and any other type of property originates from funds which have been coming into the country after July 15, 1931, in foreign currency or in free Reichsmark.

“ 2. A Konversionskasse for foreign debts will be created. The Kasse is a corporation publici juris supervised by the board of the Reichsbank and has its accounts with the Reichsbank. The board of the Reichsbank shall instal the responsible officers. A statute to be drafted by the Ministry of Economy and the board of the Reichsbank shall regulate the legal relations of the Konversionskasse. . . .

“ 3. The amounts paid into the Kasse (section 1 (1)) are to be credited to the accounts of the foreign creditors. These claims of the foreign creditors on the amounts so credited will be

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“regulated by the aforesaid statute. The Reichsbank shall fix
“the date at which such a credit balance can be paid out.”

The statute regulating the Konversionskasse was passed on July 3, 1933, and entitled the Konversionskasse to issue non-interest bearing promissory notes for money received in Reichsmarks, and also to issue interest bearing bonds so far as Reichsmark payments had not been made to satisfy a capital liability, but it was not suggested that any such promissory notes or bonds were issued to the claimants.

Following on the passing of the Moratorium Law the company duly made payment of Reichsmarks into the Konversionskasse at the appropriate rates of exchange until the outbreak of war, and some limited payments of special marks, expendable only in Germany and then only for certain purposes, were made thereout to the claimants. It was not suggested that the *de facto* acceptance of the position during the pre-war years by the claimants affected their legal rights.

On September 3, 1939, there was outstanding under the terms of the loan agreement £174,142 in respect of capital, and the claimants claimed to be entitled to rank as creditors in respect of that amount and to interest thereon. No claim was made in respect of any sums falling due before September 3, 1939, all of which had been paid into the Konversionskasse.

After the outbreak of war the company continued to make payments in Reichsmarks into the Konversionskasse in accordance with the agreement as varied by the Moratorium Law, with the result that by January 13, 1945, the company had paid at the appropriate rates of exchange the full equivalent in Reichsmarks of the whole of the loan outstanding at the passing of the law and interest thereon.

The administrator held that such payments had the effect under the municipal law of Germany then in force, that is to say, the Moratorium Law of 1933, of wholly discharging all liabilities of the company in respect of the loan both as to principal and interest. He held that as the payments of such sums into the Konversionskasse gave the company a complete discharge under German law, there was no sum due to the claimant at December 15, 1949, and he accordingly refused to allow the claimant's claim.

The claimant appealed.

[NOTE: It was not argued that the claimant's claim was excluded by virtue of the provisions of paragraph 3 (b) of the Order of 1951.]

E. Milner Holland Q.C. and *Michael Wheeler* for the appellant. The appellant seeks to question the administrator's decision (a) on the assumption that he was right in his determination as to the domestic effect of the Moratorium Law, and (b) in the alternative, on the ground that it is entitled to adduce further evidence to support its contention as to the true intent and effect of that law.

On the first limb of the argument reliance is placed on the following propositions: (1) The debt is by the express provisions of the contract made payable in London, and, accordingly, the situs of the debt is London. (2) The Moratorium Law will not be recognized as having any extraterritorial effect, so that if the debt is situate in London there was on September 3, 1939, and remains, a debt due from the company in sterling to the appellants. (3) If, however, the situs of the debt be German, it is submitted that the Moratorium Law was confiscatory in character and would not be held in an English court to be effective to destroy or vary the property rights of any person other than a German national. (4) Finally, if the above contentions be rejected, it is submitted that further performance of the loan agreement as varied by the terms of the Moratorium Law became illegal on the outbreak of war with the result that the contract was abrogated but the debt remained.

As to the situation of the debt, see Dicey's Conflict of Laws, 6th ed., pp. 303 to 307. The primary rule is that a chose in action is locally situate where the debtor resides. But if the place of payment of a debt be stipulated it will be there situate, the general rule notwithstanding. The decision of Eve J. in *In re Russo-Asiatic Bank*² is quoted as authority for this latter proposition at p. 304 of Dicey. In *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou*³ (cited in *In re Banque des Marchands de Moscou (Koupetschesky)* (No. 2)⁴) a Russian bank owed £100,000 to a German bank at a certain date. On non-payment of the debt the German bank, without objection by the Russian bank, debited the latter's account with the amount in question at the English branch of the German bank, and that appeared to be the reason why the Court of Appeal held that the debt was payable in London. It is difficult to see why a contract, which expressly provides that a debt shall arise in sterling in London, should be deemed to be situate in Germany

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² [1934] Ch. 720, 737, 738.

⁴ [1954] 1 W.L.R. 1108.

³ Unreported, C.A., 1931.

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because one of the two parties to the contract is a German national.

If proposition (1) above be accepted, then (2) the decision of Devlin J. and the Court of Appeal in *Bank voor Handel en Scheepvaart N.V. v. Slatford*⁵ covers the present case and the appellants are entitled to succeed, for the Moratorium Law, which purported to discharge the debt, could not destroy a debt situate in England, for an English court would not recognize a foreign law purporting to have extraterritorial effect. It is submitted that the *Bank voor Handel* case⁶ cannot be validly distinguished on the grounds that the subject-matter in that case was a movable and not a chose in action.

As to proposition (3) (supra), it is submitted that the Moratorium Law is a confiscatory decree. For a statement of the law and a review of the authorities in respect of the English law as to confiscatory decrees, see *Frankfurter v. W. L. Exner Ltd.*⁷ It is submitted that the view of Campbell J. sitting in the Supreme Court of Aden in *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*⁸ that all legislation that expropriates without compensation is contrary to international law was correct, and the court is invited to apply that decision in the present case. Reported cases in which English courts have upheld confiscatory legislation of foreign nations have all been cases where the legislation affected a national of the country in question, with the exception of the decision of Vaisey J. in *In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator*.⁹ But it is to be observed that Vaisey J. had not the advantage of seeing the judgment in the *Rose Mary* case.¹⁰ The observations of Scrutton L.J. in *Luther v. Sagor*¹¹ on the question of the refusal of an English court to recognize foreign legislation on the grounds that it is confiscatory and unjust were unnecessary to his decision, and, indeed, do not represent the law. The courts of this country have frequently disregarded the legislation of foreign nations and they have not been deterred from taking such a course by fear of the fact that their decision might make a *casus belli*.

*In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator*¹² should not be followed. In that case Vaisey J. seems to have considered that

⁵ [1953] 1 Q.B. 248.

⁶ *Ibid.*

⁷ [1947] Ch. 629.

⁸ [1953] 1 W.L.R. 246.

⁹ [1952] 1 T.L.R. 739.

¹⁰ [1953] 1 W.L.R. 246.

¹¹ [1921] 3 K.B. 532, 557-559.

¹² [1952] 1 T.L.R. 739.

Maugham J. in *In re Russian Bank for Foreign Trade*¹³ held that Russian confiscatory legislation was effective for all purposes. That is not a correct view of Maugham J.'s decision, which was that Russian confiscatory legislation was effective vis-à-vis its own nationals, and that decision is not contested. It is further submitted that since this court is the final court of appeal in relation to questions arising under the Distribution of German Enemy Property Act, 1949, it has a wider discretion in regard to not following decisions of courts of co-ordinate jurisdiction than would be the case if the court were sitting in its usual capacity as a court of the Chancery Division of the High Court of Justice.

Neither *Wolff v. Oxholm*¹⁴ nor *In re Fried Krupp Actien-Gesellschaft*¹⁵ appear to have been cited to Vaisey J. in *In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator*.¹⁶ As to *Wolff v. Oxholm*,¹⁷ (a) it supports the decision of Campbell J. in the *Rose Mary* case,¹⁸ and (b) the question of the plaintiff's nationality—whether he was a Dane or a British subject—was argued and the court considered it a matter of importance. *In re Fried Krupp Actien-Gesellschaft*¹⁹ was a strong case, because the contract provided that it was to be governed by German law. Nevertheless, it was held that a British subject was entitled to disregard a confiscatory German provision prohibiting the payment of interest.

There remain for consideration under this head of the argument *Luther v. Sagor*²⁰ and *Princess Paley Olga v. Weisz*,²¹ but those cases are distinguishable for they concerned confiscation by a State of the property of its own nationals. As to the effect of the Moratorium Law, any law which takes away property rights and makes no provision in express terms for compensation is a confiscatory law. The fact that something is given in exchange does not prevent the law from being termed confiscatory. "Confiscatory" means taking away property to which a person is entitled and substituting for it nothing or something in exchange which is manifestly not its equivalent in value.

As to proposition (4) (*supra*), on the outbreak of war the contract was abrogated, but on the authority of *Arab Bank Ltd. v. Barclays Bank*²² what is left is the debt with its characteristics

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¹³ [1933] Ch. 745.¹⁴ (1817) 6 M. & S. 92.¹⁵ [1917] 2 Ch. 188.¹⁶ [1952] 1 T.L.R. 739.¹⁷ 6 M. & S. 92.¹⁸ [1953] 1 W.L.R. 246.¹⁹ [1917] 2 Ch. 188.²⁰ [1921] 3 K.B. 532.²¹ [1929] 1 K.B. 718, 728, 736.²² [1954] A.C. 495.

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and not a claim for money had and received. But the characteristics of the debt do not include the Moratorium provisions, because no English court would hold that a debt survives with a characteristic which is illegal; the debt survives along with all its *legal* characteristics. There appears to be no authority in support of the above proposition.

The second limb of the argument depends on the true construction of article 7 (2) of the Distribution of German Enemy Property (No. 2) Order, 1951. It is conceded that, *prima facie*, a question of German law is by English law deemed to be a question of fact. Accordingly, it would seem that the decision of the administrator as to the true intent and effect of the Moratorium Law is final and cannot be the subject of an appeal to this court. It is submitted, however, that upon the true construction of article 7 of the Order all questions of foreign law which may arise are to be treated as questions of law. This view is supported by sub-clauses (4) to (8) of article 7.

Denys Buckley and N. C. Browne-Wilkinson for the administrator. (1) The general rule as to the situs of a debt is that a simple contract debt is deemed to be situate at the place where the debtor resides: see *per Romer L.J. in Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou*,²³ quoted by Roxburgh J. in *In re Banque des Marchands de Moscou (Koupetschesky)* (No. 2).²⁴ But since a corporation may have a dual residence it is necessary sometimes to see whether the contract provides for payment at any particular place: see *New York Life Insurance Co. v. Public Trustee*.²⁵ In *In re Russo-Asiatic Bank*²⁶ Eve J. applied the latter test and held that the debt was payable in London. The *New York Life Insurance Co.* case²⁷ was cited in argument and Eve J. must have had the decision in mind. It is submitted that *In re Russo-Asiatic Bank*²⁸ does not conflict with the decision of the Court of Appeal in *New York Life Insurance Co. v. Public Trustee*.²⁹ On the authority of the above decisions the debt in question in the present case was locally situate in Germany at all material times.

(2) If it be held that the debt is situate in London, then although it is conceded that the *Bank voor Handel* case³⁰ establishes that country A cannot legislate in respect of the transfer of property situate in country B, certainly as regards physical

²³ Unreported, 1931, C.A.

²⁴ [1954] 1 W.L.R. 1108, 1115.

²⁵ [1924] 2 Ch. 101 (C.A.).

²⁶ [1934] Ch. 720.

²⁷ [1924] 2 Ch. 101.

²⁸ [1934] Ch. 720.

²⁹ [1924] 2 Ch. 101.

³⁰ [1953] 1 Q.B. 248.

chattels, probably also as regards accrued choses in action, that doctrine has no application to contractual rights which are still executory. Where, for example, there subsists a contract made between X in Germany and Y in Great Britain which is still executory, it cannot be said that the contract has a local situation until the rights under it have accrued. Contractual rights are not governed by the *lex situs* but by the proper law of the contract. The place where the contract is entered into may be one element in assisting in the determination of the proper law; but a contract while still executory cannot have a *situs*.

The proper law of the contract means that law as altered from time to time. Accordingly, it is impossible to postulate what the rights under the contract will be until the date of maturity arrives. The validity and effect and the method of the discharge of the contract while still executory are governed solely by the proper law. The *lex situs* has no application in those circumstances and no question of extraterritoriality arises. If, therefore, the proper law of the contract in question is German, and German law altered this contract in respect of the mode of payment of the debt, that is a modification of the contract made by the proper law. *F. K. Jabbour v. Custodian of Israeli Absentee Property*³¹ draws a distinction between contractual rights which have not yet become accrued rights, and are thus governed by the proper law, and such rights which, when accrued, are governed by the *lex situs* and, accordingly, cannot be subsequently altered by a change in the proper law. [Reference was also made to *Kahler v. Midland Bank Ltd.*³²; *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*³³; *Perry v. Equitable Life Assurance Society of United States of America*.³⁴]

The determination of the proper law is thus stated in Dicey's *Conflict of Laws*, 6th ed., pp. 579 and 584: "Rule 136. . . the "term 'proper law of a contract' means the law, or laws, by "which the parties intended, or may fairly be presumed to have "intended, the contract to be governed; or (in other words) the "law or laws to which the parties intended, or may fairly be "presumed to have intended, to submit themselves. Sub-rule 1. "When the intention of the parties to a contract, as to the law "governing the contract, is expressed in words, this expressed "intention determines the proper law of the contract, and, in "general, overrides every presumption." In the present case there are three terms of the contract which point to German law

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³¹ [1954] 1 W.L.R. 139.³³ [1937] A.C. 500.³² [1950] A.C. 24, 45, 52.³⁴ (1929) 45 T.L.R. 468.

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being the proper law. Clause 5 provides that the loan shall be secured by a specific mortgage upon certain German coalfields. Clause 10 makes provision for enforcement of the contract by execution in Germany. Thirdly, and most significantly, clause 12 provides that the agreement is to be "construed in accordance with German law." If that is so, it follows that, without strong indications to the contrary, the parties intended all the incidents of the contract to be governed by German law: see the observations of Lord Wright delivering the judgment of the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*³⁵ The contract in question must be governed by German law. The circumstance that payment of the debt is to be made in London in sterling is not a cogent consideration in this respect. It is a mere detail arising in the performance of the contract.

(3) On the question whether the Moratorium Law is a confiscatory law it is to be observed that if it is confiscatory in its nature, it must always have been a confiscatory law, and, therefore, it may be material to consider the policy of the German Government relating to the passing of the law in 1933. German policy in 1933 shows plainly that the Moratorium Law was passed with the sole object of protecting German currency. At that time Germany was faced with a financial crisis similar to those experienced by other European countries in the early "thirties." An examination of the provisions of the Moratorium Law shows that it was not a confiscatory law; it substituted (a) payment in Berlin for payment (in this case) in London; (b) payment in Reichsmarks for payment in sterling; (c) payment to the Konversionskasse instead of payment to the creditor. Its object was to give to the foreign creditor rights against the Konversionskasse in respect of sums paid in to his credit. It also appointed a custodian to look after such property until such time as the German Government felt able to allow foreign creditors to be paid their debts.

On the subject generally of penal laws and confiscatory legislation, see Dicey's *Conflict of Laws*, 6th ed., pp. 152 to 160. It is submitted that a perusal of the cases shows that the doctrine that English law will not take cognizance of confiscatory legislation is confined to what may be termed *discriminatory* confiscatory legislation, that is, legislation directed at harming a particular person or a particular class or classes of persons. *Wolff v. Oxholm*³⁶ was plainly concerned with discriminatory legislation,

³⁵ [1939] A.C. 277, 298.

³⁶ 6 M. & S. 92.

for it was legislation enacted in time of war and directed against the nationals of the other party to the dispute. *In re Fried Krupp Actien-Gesellschaft*³⁷ is a comparable case, for it concerned German legislation passed during the 1914-1918 war with the object of cancelling the right of British creditors to interest on German debts. In the *Rose Mary* case³⁸ Campbell J. found as a fact that the Persian decree was discriminatory legislation directed solely against Anglo-Iranian Oil Co. Ltd. *Luther v. Sagor*³⁹ did not turn on the question of the nationality of the parties to the suit or on the question of confiscation, but it is a decision which recognizes the right of a sovereign Power to legislate in respect of land and movables situate within its own territory. *Princess Paley Olga v. Weisz*⁴⁰ is to the same effect. The decision did not turn on the nationality of the plaintiff but upon an application of the general principles enunciated in *Luther v. Sagor*⁴¹; see also *In re Russian Bank for Foreign Trade*.⁴² *Ricaud v. American Metal Co.*⁴³ is authority for the proposition that nationality does not affect the question. It is submitted that Campbell J. in the *Rose Mary* case⁴⁴ wrongly described the grounds on which *Luther v. Sagor*⁴⁵ and *Princess Paley Olga v. Weisz*⁴⁶ were decided. In *In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator*⁴⁷ Vaisey J. held, and it was necessary to his decision, that the ambit of the rules of English law concerning confiscatory legislation does not vary according to whether the property confiscated is owned by nationals or non-nationals.

The following rules of law can be deduced from the authorities: English law will recognize the validity of the legislation of a sovereign State in respect of movables or immovables situate within its jurisdiction, and no distinction is to be drawn between such property owned by nationals and that owned by non-nationals: *Luther v. Sagor*⁴⁸; *In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator*⁴⁹; *In re Francke & Rasche*⁵⁰; *Perry v. Equitable Life Assurance Society of United States of America*⁵¹; *Rex v. International Trustee for the Protection of Bondholders*.⁵² The

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³⁷ [1917] 2 Ch. 188.

³⁸ [1953] 1 W.L.R. 246, 251, 252.

³⁹ [1921] 3 K.B. 532, 548.

⁴⁰ [1929] 1 K.B. 718, 724, 728, 736.

⁴¹ [1921] 3 K.B. 532.

⁴² [1933] Ch. 745, 766.

⁴³ (1918) 246 U.S. 304.

⁴⁴ [1953] 1 W.L.R. 246, 258.

⁴⁵ [1921] 3 K.B. 532.

⁴⁶ [1929] 1 K.B. 718.

⁴⁷ [1952] 1 T.L.R. 739.

⁴⁸ [1921] 3 K.B. 532.

⁴⁹ [1952] 1 T.L.R. 739.

⁵⁰ [1918] 1 Ch. 470.

⁵¹ 45 T.L.R. 468.

⁵² [1937] A.C. 500.

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complement of the above rule is that a sovereign State cannot legislate in respect of property situate outside the State's jurisdiction whether such property is owned by nationals or non-nationals: *In re Russian Bank for Foreign Trade*.⁵³ The sole exception to the first of the above rules is that English law will not recognize the validity of legislation concerning property within the jurisdiction of the legislating sovereign State which is contrary to the usage of the law of nations.

It is submitted (a) that the Moratorium Law was not confiscatory legislation; (b) in the alternative, even if it be held to be confiscatory in character, it was not discriminatory confiscatory legislation, nor was it legislation contrary to the usage of the law of nations.

(4) If the question of the liability of the debtor is to be governed by English private international law, then the true principle is that as from the outbreak of war *further performance* of the contract was forbidden except the payment of a liquidated sum. The rule is not that the whole contract is abrogated but that further performance under the contract is forbidden: *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*⁵⁴; *Arab Bank Ltd. v. Barclays Bank*.⁵⁵ Under the contract in question everything which had to be done pursuant to its terms by the appellant company, viz., making the loan, was done before September 3, 1939. And all that was required by the German debtor was to pay the instalments on the loan. But, on the facts of the present case, the above-quoted rule of English private international law does not affect the transaction, for this was a German debt locally situate in Germany and governed by German law. The appellant's argument involves the proposition that upon the outbreak of war on September 3, 1939, a new contract came into existence.

Further, it is submitted that the provisions of the Moratorium Law did not benefit the German Reich, for on the maturity of the debt the law required the debtor to pay the money to the Konversionskasse, which held the sum to the account of the foreign creditor.

As to the second limb of the appellant's argument, a question of German law is a question of fact for the administrator: Dicey's *Conflict of Laws*, 6th ed., rule 194, p. 866. Where there is to be found in an English statute or statutory instrument a reference

⁵³ [1933] Ch. 745.

⁵⁵ [1954] A.C. 495, 525-527, 530,

⁵⁴ [1946] A.C. 219, 240, 241, 248, 535, 540, 541.
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to a "point of law," such reference is to a point of *English* law. The references to the "law" to be found in sub-clauses (4) to (8) of article 7 of the Order of 1951 are plainly references to the law normally administered by the courts there referred to and are not references to foreign law. If the administrator makes an error on a point of foreign law, that is not an error of law within the meaning of article 7. [Reference was made to *Lowenthal v. Attorney-General*.⁵⁶]

Browne-Wilkinson following. The question whether the appellant's debt has been discharged depends upon the proper law of the contract (*Dicey's Conflict of Laws*, 6th ed., rule 143, pp. 651-653), and for this purpose it matters not where the debtor resides or at what place the debt is payable. Even if the debt is situate in England but German law governs the contract under which the debt arises and a German statute discharges the debt by means of a non-discriminatory but confiscatory provision, an English court would nevertheless be entitled to hold that the debt is discharged. [Reference was made to *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.*⁵⁷; *Merwin Pastoral Co. Proprietary Ltd. v. Moolpa Pastoral Co. Proprietary Ltd.*⁵⁸]

Milner Holland Q.C. in reply. The passing of the Moratorium Law had the effect of adding a clause to the contract to the intent that in so far as the debtor paid into the Konversionskasse the debt was discharged. Accordingly, in considering whether the contract was affected by the outbreak of war it is vital to ascertain the precise terms of the contract. The terms of this contract were plainly contrary to English public policy because the import of the additional clause was to increase the resources of the enemy, since it provided for the conversion of a debt payable in sterling in London into a debt payable in Reichsmarks in Germany.

It is submitted that rule 143 at p. 651 of *Dicey's Conflict of Laws*, 6th ed., has no application in the present case. It has been urged that the proper law of this contract is German law and German law as altered from time to time. It would be extraordinary if that were held to be the intention of the parties to the contract in view of the terms of clause 2, which provide for repayment of the loan in *sterling free from all German taxes*,

⁵⁶ [1948] W.N. 66; [1948] 1 All E.R. 295, 299.

⁵⁷ [1938] A.C. 224, 228, 236-238, 241.

⁵⁸ (1933) 48 C.L.R. 565, 572, 576, 577, 579, 581, 587.

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since it is well known that the provisions of fiscal statutes are frequently subject to alteration. As to clause 12 of the contract, it is submitted that the word "construed" is there used in the narrow sense of construing a particular text of the contract. Further, the observations of Lord Wright in the *Vita Food* case⁵⁹ are obiter and should not be followed. Where parties have expressly provided that a debt is payable at a particular place, the law of that place governs the debt. Finally, even if the argument for the administrator be correct and that an English court will only refuse to recognize the validity of confiscatory legislation if it is also discriminatory, the Moratorium Law is discriminatory because it discriminates against all foreign creditors. [Reference was also made to *New York Life Insurance Co. v. Public Trustee*⁶⁰ and *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou*.⁶¹]

Cur. adv. vult.

December 8, 1955. UPJOHN J. read the following judgment: This case comes before me as a case stated by the Administrator of German Enemy Property under the provisions of the Distribution of German Enemy Property Act, 1949 (which I shall refer to as "the Act").

The Act provides that Orders in Council may be made for the collection and realization of German enemy property, and for the distribution thereof to persons who establish claims in respect of German enemy debts. By section 8 of the Act a German enemy debt is defined as being a sum due at the passing of the Act, namely, December 16, 1949, in respect of an obligation incurred before September 3, 1939. By the Distribution of Enemy Property (No. 2) Order, 1951, made in pursuance of the Act, it is provided that the Administrator of German Enemy Property is to determine whether any claim is established for the purposes of the Order but that, if the claimant is dissatisfied with the determination as being erroneous in point of law, the administrator is to state and sign a case for the opinion of the High Court. He has decided against the claim.

[His Lordship stated the facts and continued:] I have been told that there was no formal hearing before the administrator, and that he determined the matter solely upon the question as to the effect of the Moratorium Law by the municipal law of

⁵⁹ [1939] A.C. 277, 298.

⁶¹ Unreported, C.A., 1931.

⁶⁰ [1924] 2 Ch. 101, 109, 112, 115, 129.

Germany. He did not consider, because they were not put to him, any of the many interesting questions which have been argued before me, and which I must now mention.

I will assume, though it is not conceded, that the administrator was right in his determination as to the domestic effect of the Moratorium Law. On that footing Mr. Milner Holland, for the claimant, submits four main points. (1) That as the debt is by the terms of the contract made payable in London, the debt of the company to the claimants is situate in London. (2) The Moratorium Law will not be recognized as having any extraterritorial effect so that if the debt is situate in London there was on September 3, 1939, and remains, a debt due from the company in sterling to the claimants. (3) If, however, the situs of the debt be German, he submits that the Moratorium Law is confiscatory and would not be held in an English court to be effective to destroy or vary the rights of any person other than a German national. (4) Finally, he says, that if he is wrong on all the foregoing points, further performance of the loan agreement as varied by the terms of the Moratorium Law became illegal on the outbreak of war, with the result that the contract is abrogated but the debt remains.

Mr. Buckley, for the administrator, submits: (1) That the effect of the Moratorium Law depends not upon the local situation of the debt but upon the proper law of the contract, which he submits is German. (2) On that footing the English courts must give effect to all German laws unless they are discriminatory against some particular person or class of persons and the Moratorium Law, he contends, is not such a law. (3) That the outbreak of war suspended but did not abrogate the contract, for all that remained to be done thereunder was payment of a liquidated sum of money.

The first question that I must determine is whether the applicability of the Moratorium Law is to be tested by reference to the local situation of the debt or by the proper law of the contract. I am concerned with the effect of a law passed in 1933 upon a series of debts which, although accrued, only became payable on or after September 3, 1939.

In my judgment, the question whether a liability to pay a debt payable on a future date has become modified or annulled by legislation must depend upon the question whether such legislation affects the contractual obligation, for the matter still rests in contract. Indeed, it does not seem appropriate to speak of a debt having a local situation until it is payable and can be

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recovered by suit, for its situs primarily depends upon the residence of the debtor when it is recoverable. I think that distinction was recognized by Pearson J. in *Jabbour v. Custodian of Israeli Absentee Property*,¹ where he was concerned with debts or choses in action such as a claim for unliquidated damages which could be sued for at the date of the modifying legislation. The power of legislation to affect a contract by modifying or annulling some term thereof is a question of discharge of the contract which, in general, is governed by the proper law (see *Kahler v. Midland Bank*,² a case to which I return later).

It is clear that the proper law of the contract depends on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding facts; the parties may have actually expressed their intention upon the matter, and in such a case, *prima facie*, their intention will be effectuated by the court: *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.*³

In favour of the view that English law is intended to govern the contract, the following indications are to be found in the loan agreement. First, the debt is payable in London in sterling without deduction for any German taxes. Secondly, the English translation is the governing translation, and it would appear that the form of the agreement is one which is appropriate to English law. There was no evidence before me as to whether it is appropriate to German law. Thirdly, it contemplates that bonds may be issued, and such bonds are to be in accordance with the text and practice ruling in the City of London.

In favour of German law there are the following indications: First, that there are to be mortgages on German immovable property; such mortgages are to be inscribed in a German register. The loan agreement also provides that if the company makes any default, it would submit to immediate seizure in execution after formal authorization by a notary public. Those considerations are not conclusive upon the question, for the parties may well contemplate that different parts of their contract shall be governed by different law.

Secondly, it is provided that the loan agreement is to be construed in accordance with German law. That is very

¹ [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

² [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

³ [1938] A.C. 224, 240; 54 T.L.R. 5; [1937] 4 All E.R. 206.

important, for if an agreement is to be construed in accordance with German law it can scarcely be doubted that the parties contemplate that their rights will be governed by German law—it would be strange indeed to construe an agreement by German law (although the English text is to prevail), and then to apply to the construction so reached rules of English law. Lord Wright made some observations on this in the Privy Council case of *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*⁴ He had mentioned the case of *The Torni*,⁵ where the Court of Appeal had held that a clause providing that certain bills of lading were to be construed in accordance with English law did not mean that the whole contract was to be governed by English law. Lord Wright said⁶: “There were certain differences “between that case and the present. One was that the bills of “lading had a clause providing that they were ‘to be construed “‘in accordance with English law’ not as in the present case “‘shall be governed by English law.’ In their Lordships’ judgment that distinction is merely verbal and is too narrow to “make a substantial difference. The construction of a contract “by English law involves the application to its terms of the “relevant English statutes, whatever they may be, and the rules “and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense “the construing of the contract has the effect that the contract “is to be governed by English law.”

*The Torni*⁷ was rather a special case, and is an illustration of the principle that the parties’ expression of intention is only prima facie evidence as to the proper law. This court will not necessarily regard that as being the governing consideration where a system of law is chosen which has no real or substantial connexion with the contract looked upon as a whole. No such considerations arise in the present case. Mr. Milner Holland argued in the alternative that even if German law was the appropriate law, the parties intended that only German law as it stood in 1924 should govern their relationship. He pointed to the provision for payment free of all German tax as showing that the parties could not have contemplated that subsequent German legislation was to govern their rights. I cannot so interpret the intentions of the parties as evinced in the language they have used.

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⁴ [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.

⁵ [1932] P. 78; 48 T.L.R. 471.

⁶ [1939] A.C. 277, 298.

⁷ [1932] P. 78.

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I regard clause 12 as decisive of the matter and, in my judgment, the parties intended that German law was to govern their relationship, that is, German law as it exists from time to time, and that is the proper law of the loan agreement. For the reasons I have already given, I do not think that the situs of the debt is the relevant consideration, but as the matter has been very fully argued before me and I have been referred to an unreported decision of the Court of Appeal of over 20 years' standing, which is much in point, I think I ought to express my views thereon.

The general rule is clear that the debt is locally situate where the debtor resides, in this case Germany. Mr. Milner Holland, however, submits that that rule is altered by the terms of the contract between the parties, and he relies upon the statement to be found in the sixth edition of Dicey's Conflict of Laws, p. 304: "If the place of payment of a debt be stipulated it will be there situate, the general rule notwithstanding." He also relies on a statement of the law by Eve J. in *In re Russo-Asiatic Bank*,⁸ where he said this: "although as a general rule the location of simple contract debts is the place in which the debtor is to be found, that rule, in my opinion, does not apply here, where the obligation is in terms to pay in sterling in London." It is to be noted that in that case the debtor resided both in Russia and in England, and in those circumstances it was a perfectly accurate statement of the law, whatever interpretation is to be placed on the judgments in the Court of Appeal in *New York Life Insurance Co. v. Public Trustee*,⁹ to which I now turn.

In that case all the three members of the court pointed out that, strictly, a debt can only be sued upon in the place where it is payable, and although no doubt in a proper case the creditor may have a right to sue the debtor in another place, such right is to sue not for debt but for breach of contract for the failure to pay the debt in the due place of payment; the conclusion would seem to follow that the debt is situate where the debt is payable.

On the other hand, Mr. Buckley submits that when properly understood, the Court of Appeal decided that the place of payment becomes relevant to the question of situs only when it is established that the debtor has two or more residences, and certainly some passages in the judgments of the judges who formed the court support that view. In my judgment, in this court the matter is concluded by the unreported case

⁸ [1934] Ch. 720, 738.

⁹ [1924] 2 Ch. 101; 40 T.L.R. 430.

in the Court of Appeal already referred to, namely, *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou*.¹⁰ A transcript of the judgments has been made available to me. I have sent for the pleadings in that case, and it is clear that the plaintiffs were assignees of a bank (the Deutsche Bank), whose principal office was in Berlin, but who had a branch in England. The defendant, a Russian bank with no branch in England, was indebted to the London branch of the Deutsche Bank on current account and, therefore, in accordance with the general rule of banking law the debt was payable in London. It is clear that there was no express term of any contract making the debt payable in London. The point now under discussion was not dealt with by Scrutton L.J., but Greer L.J. formulated a number of propositions, among them these: “(4) On January 10, 1920, the Treaty of Peace Order in Council came into operation whereby enemy choses in action having a situs in this country became vested in the Custodian, afterwards called the Administrator, of German property. (5) At this time the bank had no residence in this country, but the debt was payable in this country. (6) The debt in question, therefore, did not pass to the administrator, residence of the debtor being an essential element in deciding the situs of the debt.”

Later on he said: “With regard to the propositions numbered (4) (5) and (6). At the date when the Treaty of Peace Order in Council came into operation, namely, January 10, 1920, the defendants had no place of business in, and were therefore not resident in, the United Kingdom, and I think it is established by the decision in this court in *New York Life Insurance Co. v. Public Trustee*¹¹ that the debt had no situs in this country. I regard that case as establishing that it is an essential element in determining the situs of a debt due to a foreign corporation that at the material date the corporation should have a residence within the jurisdiction in which the debt is payable.”

Romer L.J., after discussing the *New York Life Insurance Company's* case, said this: “As the debt in question was, in terms of the contract creating it, payable in this country, and in addition was recoverable here, its locality was held to be English. In the present case the debt is payable in this country, but the defendant bank was not residing here on

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¹⁰ Cited in [1954] 1 W.L.R. 1108;
reported on a point of practice (1931-
1932) 107 L.J.K.B. 386.

¹¹ [1924] 2 Ch. 101.

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" January 10, 1920. It was in May of the same year, but that
" will not help the plaintiffs. The debt was also recoverable here
" on January 10, 1920, had the plaintiffs been successful in
" obtaining leave to serve the defendant bank out of the juris-
" diction. But I know of no authority for the proposition that
" a simple contract debt is situate in this country at a time when
" the debtor is not resident here, namely, because he can be
" sued by putting into operation the provisions of Order XI."

It is true that in that case the decision of the court was ultimately of no effect upon this point for it was found upon further evidence that the defendant bank had no existence at the relevant time, but it is clear that the majority of the court intended to lay down finally their views upon the law "*de bene esse*" in the words of Greer L.J. in case upon further inquiry the bank was found to be in existence. Therefore I do not think I can treat the observations of Greer L.J. and Romer L.J. as obiter dicta, and the case is binding upon me if applicable to the present circumstances. It seems to me that the only distinction that can be drawn between that case and this is that in this case the debt is payable in London by the terms of the contract and not by virtue of the general law applicable thereto and that circumstance is indeed strongly relied upon by the claimants. In my judgment, however, that forms no proper ground of distinction, for the law must be the same whether the debt is payable in a particular place by virtue of the express terms of the contract or by general law applicable thereto. Nor can I accept the argument that, as on one construction of section 8 of the Act there is no appeal from my decision, I am at liberty to disregard a well-settled canon of procedural law, that decisions of the Court of Appeal are binding on this court. Accordingly, in my opinion, the locality of the debt in this case is Germany, the only place where the debtor resides.

Mr. Milner Holland's second point does not arise on the view I have formed, and I turn to his third main point, namely, that the 1933 Moratorium Law is confiscatory and will not be recognized as affecting the contractual rights of the parties even where the debt is situate in Germany and the proper law is German, save only in cases where German nationals are concerned.

I start with the elementary proposition that it is part of the law of England, and of most nations, that in general every civilized State must be recognized as having power to legislate in respect of movables situate within that State and in respect

of contracts governed by the law of that State, and that such legislation must be recognized by other States as valid and effectual to alter title to such movables and to sustain, modify or dissolve such contracts. The substantial question I have to determine is what limit is to be imposed upon that proposition when the effect of such legislation comes to be debated in the courts of other States. I may note in passing that the modern tendency is to deny extraterritorial validity to legislation, for example, upon movables situate outside the state at the time of the legislation: *Bank voor Handel en Scheepvaart N.V. v. Slatford*.¹²

To this general principle of recognition in foreign courts of territorial validity of legislation there are undoubted limitations or exceptions as the following examples show: (1) No State will enforce the fiscal laws, however proper, of another State, nor penal statutes, using that phrase in the strict sense of meaning statutes imposing penalties recoverable by the State for infringement of some law. "The penal laws of foreign countries are strictly local and affect nothing more than they can reach and can seize by virtue of their authority," *per* Lord Loughborough in *Folliott v. Ogden*.¹³ (2) English law will not recognize the validity of foreign legislation intended to discriminate against nationals of this country in time of war by legislation which purports to confiscate wholly or in part movable property situated in the foreign State. As long ago as 1817 such confiscation was described by Lord Ellenborough C.J., in *Wolff v. Oxholm*,¹⁴ as "not conformable to the usage of nations." That case also shows that legislation tending to preserve enemy property by the appointment of a custodian will be recognized. Another case illustrative of the principle is *In re Fried Krupp Actien-Gesellschaft*,¹⁵ where Younger J., while recognizing the validity of German legislation which prohibited payment to enemy nationals in time of war, held that a German law passed shortly after the outbreak of war which purported to cancel and not merely to suspend liability for payment of interest by a German to a British firm would not be recognized in these courts although the proper law of the contract was German. Younger J. said: "And this ordinance, as well as similar German ordinances enacted at the same time and made applicable to France and Russia, have this feature common to

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¹² [1953] 1 Q.B. 248; [1951] 2 T.L.R. 775; [1951] 2 All E.R. 779. ¹⁴ (1817) 6 M. & S. 92.
¹³ (1789) 1 H.Bl. 123, 135. ¹⁵ [1917] 2 Ch. 188, 192.

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"all, that their intention plainly is to penalize particular classes
"of persons, and incidentally to injure the enemy countries to
"which these persons belong."

(3) English courts will not recognize the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals; *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*,¹⁶ which treated the Spanish laws purporting to expropriate the ex-King of Spain's property as examples of penal legislation; and see *Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary)*,¹⁷ where Campbell J., sitting in the Supreme Court of Aden, held certain laws of the State of Persia which he found to be passed to nationalize the plaintiff company only without compensation were confiscatory and ineffectual to pass title.

Another example suggested by Professor Lauterpacht in the 8th edition of Oppenheim's International Law, at p. 268, is a law passed by a foreign State expropriating the property in such State of British Protestants.

I do not challenge the correctness of the decision in the *Rose Mary* case¹⁸ upon the facts of that case, but Campbell J. came to the conclusion that the authorities both of this and other countries justified the formulation of a more general principle, namely: (1) all legislation that expropriates without compensation is contrary to international law; and (2) that such law is incorporated in the domestic law of Aden and accordingly such legislation will not be recognized as valid in the courts of Aden. Unless the law of England takes a different view of international law from the law of Aden, the judge's conclusions can only be correct if his interpretation of *Aksionairnoye Obschestvo A.M. Luther Co. v. James Sagor & Co.*¹⁹ and *Princess Paley Olga v. Weiss*²⁰ is correct. Those cases, both in the Court of Appeal, were concerned with the effect of Russian legislation introduced shortly after the Russian Revolution of 1917 which in fact expropriated certain types of private property situate in Russia without any compensation. They established the principle that this court will not inquire into the legality of acts done by a foreign government in respect of property situate in its own territory. Campbell J. considered that principle to be valid only where the property confiscated belongs (as in both those cases) to

¹⁶ [1935] 1 K.B. 140; 50 T.L.R. 284.

¹⁷ [1953] 1 W.L.R. 246.

¹⁸ Ibid.

¹⁹ [1921] 3 K.B. 532; 37 T.L.R. 777.

²⁰ [1929] 1 K.B. 718; 45 T.L.R. 365.

subjects of the confiscating State. However, all three judgments in *Luther v. Sagor*²¹ laid down the principle in perfectly general terms and it was in no way limited, at any rate in express terms, to a recognition of the validity of such legislation in relation only to nationals of the confiscating State.

Bankes L.J. said this²²: "Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called." The authorities he did not think it necessary to discuss included *Folliott v. Ogden*²³ and *Wolff v. Oxholm*.²⁴ I do not understand the Lord Justice to be purporting to overrule those cases without examination, but to be treating them as irrelevant because they were exceptions to the general rule as examples of penal legislation (in the strict sense) and of discriminatory legislation respectively which in his view had no application to the case before him.

In equally general terms were the judgments of two members of the court in *Princess Paley Olga v. Weisz*.²⁵ It seems clear that Scrutton L.J. drew no distinction between the operation of legislation upon the property of a national of the confiscating State and a foreigner who had movables in that State, for he said this²⁶: "The United States, situate in the neighbourhood of South and Central American Republics, where the life of any Government is precarious and its death rarely by natural causes, frequently found in its territory property seized by a revolutionary force which ultimately succeeded in establishing itself in power and there sold the goods it had seized to persons who exported them to the United States, where they were claimed by their original owners. In *Oetjen v. Central Leather Co.*²⁷ these facts occurred with reference to a seizure in Mexico of property of a Mexican citizen which when sold came into

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²¹ [1921] 3 K.B. 532.

²² *Ibid.* 546.

²³ 1 H.Bl. 123.

²⁴ 6 M. & S. 92.

²⁵ [1929] 1 K.B. 718.

²⁶ *Ibid.* 724.

²⁷ (1918) 246 U.S. 297.

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"the United States, and in *Ricaud v. American Metal Co.*²⁸ "they occurred again with respect to the property of a citizen "of the United States." He then went on to state the general principle, which I need not restate.

It is true that Russell L.J., in that case, said²⁹: "This "court will not inquire into the legality of acts done by a foreign "government against its own subjects in respect of property "situate in its own territory," but it was sufficient for the decision of the case before him, and he dealt with the point very briefly.

Maugham J., in *In re Russian Bank for Foreign Trade*,³⁰ also stated the principle in the same limited way but his remarks were obiter.

On the other hand, in *Perry v. Equitable Life Assurance Society of United States of America*³¹ the plaintiff, a British subject residing in Russia, took out a policy of life assurance with the defendants, the proper law of the contract being Russian. It was held that certain confiscatory decrees of the Russian Government were effective to annul the contract, though it is true that no point was taken that such decrees could be valid only against Russian nationals. This case was quoted without disapproval by Lord Radcliffe in *Kahler's* case.³²

In *In re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v. The Liquidator*³³ (which does not appear to have been cited to Campbell J.) Vaisey J. expressed the view that the general principle was not limited to nationals of the confiscating State. I respectfully agree with him, for it seems to me that on this question nationality must be irrelevant. If the principle be true in respect of a State in relation to its own nationals, it must surely be conceded in relation to those persons who, though not subjects of the State, nevertheless bring their movables within its jurisdiction for business or private reasons or for the like reasons enter into contracts governed by the law of the State, and in general enjoy the same benefits and protection and are subject to the same disadvantages and disabilities as subjects of the State.

With all respect to Campbell J., I think that *Luther v. Sagor*³⁴ and *Princess Paley Olga v. Weisz*³⁵ laid down principles of

²⁸ (1918) 246 U.S. 304.

²⁹ [1929] 1 K.B. 718, 736.

³⁰ [1933] Ch. 745; 49 T.L.R. 253.

³¹ (1929) 45 T.L.R. 468.

³² [1950] A.C. 24, 56.

³³ [1952] 1 T.L.R. 739; [1952]

1 All E.R. 1269.

³⁴ [1921] 3 K.B. 532.

³⁵ [1929] 1 K.B. 718.

general application not limited to nationals of the confiscating State.

In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign States in so far as it affects title to movables in that State at the time of the legislation or contracts governed by the law of that State rests in considerations of international law, or in the scarcely less difficult considerations of public policy as understood in these courts. Ultimately I believe the latter is the governing consideration. But, whatever be the true view, the authorities I have reviewed do show that these courts have not on either ground recognized any principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation. That view is further supported by the authorities on exchange control legislation which I must now consider.

It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitants regardless of their nationality by various measures of foreign exchange control or by altering the value of its currency, is recognized by foreign courts although its effect is usually partially confiscatory. Probably there is no civilized country in the world which has not at some stage in its history altered its currency or restricted the rights of its inhabitants to purchase the currency of another country. Most countries, including the United Kingdom, are restricting those rights at this very moment. In individual cases the result of such legislation is in fact to confiscate in some degree private rights of property but the right of the State to do so has never been challenged.

A few examples may be cited. In *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*³⁶ His Majesty's Government in a contract made in 1917, whose proper law was that of the U.S.A., contracted to pay a debt by instalments at the option of the holder in New York in gold coin of the U.S. of a certain weight and fineness or in London at a certain rate. A resolution of Congress in 1933, which had the force of law of the U.S.A., held that such a provision was against public policy, as it obstructed the power of Congress to regulate the value of money of the United States and that such an obligation was discharged by payment dollar for dollar of coin which at the time of payment was legal tender. As in the meantime the U.S.A. had devalued the dollar, the direct result of that

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³⁶ [1937] A.C. 500; 53 T.L.R. 507; [1937] 2 All E.R. 164.

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legislation was to reduce the value of the debt sued upon and pro tanto to confiscate without compensation the property rights of the holder, but it was never suggested that such a resolution was not thereby applicable as part of the proper law of the contract.

Another case is *Kahler v. Midland Bank Ltd.*,³⁷ already mentioned. In that case certain exchange regulations of Czechoslovakia which had in effect been in force since 1934 made unlawful without the permission of the Czechoslovakian National Bank transfers of foreign securities from (among other cases) currency "inlanders" to currency "foreigners." Lord Simonds said³⁸: "It is necessary only to say that the relevant law "relating to foreign exchange, under which the delivery without "a consent that was in fact withheld would be illegal, is not in "my opinion a law of such a penal or confiscatory nature that "it should be disregarded by the courts of this country."

Lord Reid said³⁹: "I have already stated that in my opinion "an exchange control regulation of the kind here in question is "not within the kind of foreign law which an English court "cannot recognize." And Lord Radcliffe said⁴⁰: "There is "nothing in the contract that would prevent him from calling "for the shares at any time; but the law of Czechoslovakia to "which the contract is subject has so far modified his right so "to recover possession of the shares as to make the consent of "the National Bank a condition precedent. If, then, the courts "of this country are to recognize that modification, Mr. Kahler "lacks a present right to possession. It seems to me that we "should ignore an established rule of our private international "law if we were not to give effect to the currency regulation in "question. If the proper law of the contract is the law of "Czechoslovakia, that law not merely sustains but, because it "sustains, may also modify or dissolve the contractual bond. "The currency law is not part of the contract, but the rights "and obligations under the contract are part of the legal system "to which the currency law belongs. So to decide is to give "effect to the same principle as was upheld by our courts when "the United Kingdom Government's obligations under its "American loan of 1917 were treated as modified by American "legislation (see *Rex v. International Trustee for the Protection "of Bondholders A/G*).⁴¹, or when Mr. Perry's life assurance

³⁷ [1950] A.C. 24.

³⁸ Ibid. 27.

³⁹ Ibid. 47.

⁴⁰ Ibid. 56.

⁴¹ [1937] A.C. 500.

“ policy was annulled by supervening legislation in the U.S.S.R.
 “ (see *Perry v. Equitable Life Assurance Society of the United*
States of America ⁴²). ”

The case of *Merwin Pastoral Co. Proprietary Ltd. v. Moolpa Pastoral Company Proprietary Ltd.*,⁴³ a decision of the High Court of Australia, also affords a useful illustration. The State of New South Wales passed a law providing, inter alia, that all personal rights to payment under mortgages of or agreements for sale of land in New South Wales should be void, leaving the parties to their remedies against the land. The parties litigated in the State of Victoria. On appeal to the High Court, Evatt J. said ⁴⁴: “ I therefore think that the governing law of the contract “ was that of New South Wales. But Macfarlan J. was also, “ I gather, prepared to decide against the present appellant upon “ the separate ground that the ex post facto New South Wales “ legislation was very unmeritorious and its application would “ probably ‘ work manifest injustice to or, in effect, a fraud on “ ‘ one of the parties.’ It is true that, very occasionally, upon “ grounds of public policy, English courts have refused to accord “ recognition to some part of the law of a foreign country, which “ might otherwise be treated as governing or underlying a “ transaction. It is, in my view, not permissible for a Victorian “ court to adopt such an attitude here. All that the legislature “ of New South Wales did was, in a period of unexampled “ economic crisis, to revise, alter, suspend or discharge certain “ contractual obligations over which it could exert its constitu- “ tional power. The legislature of Victoria, too, enacted a law “ which differed in degree only from that of New South Wales.”

In my judgment these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law of the contract or where the movable is situate within the territorial jurisdiction of the State. That, however, is subject to the qualifications that this court is entitled to be satisfied that the foreign law is a genuine foreign exchange law, that is, a law passed with the genuine intention of protecting its economy in times of national stress and for that purpose regulating (inter alia) the rights of foreign creditors, and is not a law passed ostensibly with that object, but in reality

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⁴² 45 T.L.R. 468.⁴⁴ Ibid. 587.⁴³ (1933) 48 C.L.R. 565.

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with some object not in accordance with the usage of nations. The title and expressed purpose of such legislation are not conclusive upon the point. For example, in *Frankfurter v. W. L. Exner Ltd.*⁴⁵ a law was passed under the Hitler régime in Austria with the apparently innocent object of providing for receivers in certain cases, but with the real object of confiscating the property of Jews and others. Romer J. expressed the view that this court is entitled to inquire what manner of legislation it really was, and for that purpose to see what was done under it. Again, if it had not been for the difficulties which arose on the pleadings in that case, I do not think the House of Lords in *Kahler's* case⁴⁶ would have hesitated to investigate the question whether an exchange control statute passed in 1934 with the genuine object of protecting the State's economy had not by 1946 become an instrument of oppression and discrimination.

Further, while every State is in the best position to know what measures of control are best suited to its particular needs, and must be allowed much latitude in its choice of control weapons, there are limits in the recognition to be afforded to such legislation; and this court must be entitled to consider whether, looking at all the circumstances, the law is so far-reaching in its scope and effect as really to offend against considerations of public policy of this country.

I turn to a more detailed consideration of the Moratorium Law. As the point was never taken before the administrator, there is unfortunately no statement in the case stated of the circumstances in which the Moratorium Law came to be passed. I am told it was passed in the earliest days of the Hitler régime, but Mr. Milner Holland has conceded that there is nothing sinister in that, and that the law was passed in an honest attempt to solve Germany's economic position.

Now the Moratorium Law did three things: (1) It permitted the debtor to pay in marks instead of sterling. That is not only a usual, but almost essential part of currency control. (2) It altered the place of payment from London to Berlin, not in time of peace and free communication between nations in itself a very serious matter. (3) It altered the method of discharge, for instead of being compelled to pay the creditor in sterling in London, it enabled the debtor to pay a government agency in marks in Berlin.

⁴⁵ [1947] Ch. 629.

⁴⁶ [1950] A.C. 24.

So far as the creditor was concerned, he could not complain so long as such payments were made, but it did not cancel the balance of the debt, either principal or interest, for it appears that the original obligation was only discharged *pro tanto* upon payment of marks into the Konversionskasse. On the other hand, upon such payments being made the creditor could no longer sue his debtor for payment in sterling in respect of the instalments discharged by such payment, and I assume that on the last due payment being made into the Konversionskasse (as it was) the creditor could no longer proceed to enforce his rights as mortgagee. Briefly, in such case his rights were extinguished as against the debtor.

Mr. Milner Holland submitted that the wording of the relevant laws and the obligations thereby cast upon the Konversionskasse were so vague and indefinite that it could not properly be said that, in exchange for such extinction the creditor received any rights against the Konversionskasse; and that, he said, amounted to pure confiscation which was also discriminatory against a class consisting of Germany's foreign creditors. There is much force in that argument. On the other hand, accepting the view that this was a genuine attempt to protect Germany's economy and not, for example, an attempt to build up a secret war fund for use against this and other countries, some years later the legislation appears to create a state of affairs with which we in this country are not wholly unfamiliar.

The general scheme of the legislation was this. The debtor was to make payments into a government agency on behalf of the creditor. Such payments were to be credited to each creditor and payment out was to be made at such date as the Reichsbank should fix. That is not unlike a blocked account. There was an economic blizzard blowing in the early 1930's; even the United States felt its force, as we are reminded by the *International Trustee* case.⁴⁷ It had led this country to suspend the gold standard in September, 1931. I must assume that the genuine object and purpose of this Moratorium Law was to prevent a scramble for payment among Germany's foreign creditors, which might have resulted in another collapse of the mark; I must assume that the intention of the German law was to ensure so far as possible that when the storm had passed trading and debtor and creditor relationships might be resumed in an orderly manner. In my judgment, this was foreign exchange control legislation

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⁴⁷ [1937] A.C. 500.

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which must be recognized by this country as effective to modify contractual obligations where the proper law is German.

The next question is as to the effect of the outbreak of war on September 3, 1939, upon the rights of the contracting parties. At that date the position was that the claimants had long since performed all their obligations under the contract, and all that remained to be done by the company was payment of a liquidated sum of money by instalments of principal and interest as set out in great detail in the schedule to the loan agreement. By the Moratorium Law this obligation could be discharged by payment in Reichsmarks to the Konversionskasse. It is argued that upon the outbreak of war the provision for payment to the Konversionskasse became illegal, as it tended to increase the resources of the enemy, for it was said the German Government would no doubt have the use of the money paid into the Konversionskasse. Upon that footing it was said that the provision permitting the discharge of the contract by payment to the Konversionskasse became illegal but, as it was admitted that you cannot abrogate a particular term of a contract, whether expressed or implied by the general law governing the contract, the result must be that the whole contract was abrogated in the sense that no part of it could legally be performed thereafter, but the original debt with all its characteristics remained: see *Arab Bank Ltd. v. Barclays Bank Ltd.*⁴⁸

The principles of law to be applied are well settled by the highest authority. In *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*⁴⁹ Lord Dunedin said: "From these cases I draw the conclusion " that upon the ground of public policy the continued existence " of contractual relation between subjects and alien enemies or " persons voluntarily residing in the enemy country which " (1) gives opportunities for the conveyance of information which " may hurt the conduct of the war, or (2) may tend to increase " the resources of the enemy or cripple the resources of the " King's subjects, is obnoxious and prohibited by our law."

It is clear, however, that, in the words of Lord Russell in *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*,⁵⁰ " a " contract which is completely executed on one side and under " which nothing remains to be performed except payment to be " made by the other of a liquidated sum whether already due, or

⁴⁸ [1954] A.C. 495; [1954] 2 All E.R. 226.

⁴⁹ [1918] A.C. 260, 274; 34 T.L.R. 208.

⁵⁰ [1946] A.C. 219, 248-249; 62 T.L.R. 122; [1946] 1 All E.R. 36.

“debitum in praesenti solvendum in futuro, is unaffected by the “outbreak of war.” Lord Morton of Henryton quoted that passage with approval in the *Arab Bank* case.⁵¹ If, therefore, the claimants had been under an obligation to the company to pay a liquidated sum by instalments, that obligation would have been suspended, not abrogated.

This is the converse case but, in my judgment, the same principles apply. The contract is wholly executed on one side, no question of any continued intercourse between subjects and alien enemies arises. Had the original obligation to pay in sterling in London remained, that obligation, in my judgment, would not have been abrogated but suspended; the German Government under legislation passed for that purpose could have directed payment to a German Custodian of Enemy Property without offending any principle of public policy of this country or of international law. In fact, the proper law permits payment in Germany to a German agency. I cannot see that transfer of German marks from one person to another in Germany increases the resources of the enemy unless such transfer is the result of some seizure of enemy funds by the German Government for use against its enemies. Whether such a seizure would in itself be illegal I do not pause to consider (see *In re Ferdinand, Ex-Tsar of Bulgaria* ⁵²), as no such seizure is suggested here. I must assume that payments made by the company into the Konversionskasse remained at all material times to the credit of the claimant in some blocked account.

In my judgment this point also fails.

I have so far assumed the correctness of the administrator's decision that the Moratorium Law did in the events which have happened operate, by the municipal law of Germany, to extinguish the debt. The claimants challenge that decision, and desire to tender evidence of German law to prove the contrary. Whether they are entitled to do so depends on the construction of article 7 (2) of the Distribution of German Enemy Property (No. 2) Order, 1951.

[His Lordship read the article and continued:] Mr. Milner Holland concedes that *prima facie* a question of German law is by the law of this country a question of fact upon which, therefore, the administrator's decision would be final, but he submits that upon the true construction of article 7 all questions of foreign

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⁵¹ [1954] A.C. 495, 526.

⁵² [1921] 1 Ch. 107.

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law that may arise are to be treated as questions of law. He submits that this is shown by sub-clauses (4) to (8) inclusive.

The Act is an Act passed for the benefit of Her Majesty's Government, British subjects or British protected persons resident or carrying on business in the United Kingdom, and any body of persons corporate or unincorporate, incorporated or constituted under the laws in force in the United Kingdom, for they alone are creditors as defined in section 8 of the Act. Such persons or bodies may be resident in any part of the United Kingdom, and if they desire to challenge the correctness of the administrator's decision in law they must do so, so it seems to me, by reference to some system of law operating within the United Kingdom. It would be highly inconvenient if, for example, a Jersey man made a claim in this court claiming that Jersey law ought to be applied; the Act therefore refers the matter to the Jersey court. It may then be found that the parties intended that the law of some foreign State (probably, though not essentially, Germany) should govern their relations. If so, that law must be then ascertained and applied by the Jersey courts to such extent and in such manner as Jersey law provides.

I do not think that the clause was intended to have any greater operation than that, or inferentially to alter a well settled rule of English municipal law. If the draftsman of the order had intended that German law was to be treated as a question of law, even in those parts of the United Kingdom where the municipal law treats it as a question of fact, surely he would have said so in clear and unmistakable terms.

This point also fails.

I dismiss the claimants' appeal with costs.

Appeal dismissed.

Solicitors: *Slaughter & May; Solicitor, Board of Trade.*

J. A. G

In re DICEY, DECD. JULIAN *v.* DICEY.

1956
Mar. 27.

[1955 D. 1986.]

Danckwerts J.

Will—Election—Bequest of property of third parties—Part owner benefiting under will—Doctrine of election applicable.

A testatrix by clause 4 of her will, made in 1950, devised to the plaintiff, her grandson, "my two freehold houses in Beresford Road, . . ." By clause 5 she gave the defendant, her son, another freehold house, and also her real and personal residuary estate.

The testatrix had no disposable interest in the two freehold houses in Beresford Road, which she merely occupied as a life tenant under a deed of family arrangement made in 1939, by which the defendant became on her death entitled to a half share of the beneficial interest in the houses, and the plaintiff and his brother to a quarter share each.

The plaintiff claimed that the defendant must elect either in favour of the will and give effect to the devise to him (the plaintiff) so far as he could, or against the will, and compensate the plaintiff to the extent of his (the defendant's) interest under the will in respect of the plaintiff not receiving the defendant's share of the two houses. The defendant contended that the doctrine of election did not apply, on the ground, *inter alia*, that he himself could not give effect to the devise, since a quarter share belonged to the plaintiff's brother:—

Held, that the doctrine of election was on the authorities applicable, and the defendant must, within a reasonable time, elect either for or against the will.

Dictum in *Rogers v. Jones* (1876) 3 Ch.D. 688 applied.

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The testatrix, Selina Dicey, made her will on October 18, 1950, and died on September 10, 1954, having appointed the defendant, Charles Dicey, to be executor of her will. After bequeathing all her jewellery to her grand-daughter, and her business as a green-grocer and fruiterer, and the freehold property known as 301, Higham Hill Road, from which the business was carried on, to her daughter-in-law; by clause 4 she made the following devise to the plaintiff, her grandson, James Julian: "my two freehold "houses in Beresford Road, Walthamstow, aforesaid, and I also "bequeath to my said grandson my piano and my radio set." By clause 5 she bequeathed to her son, the defendant, Charles Dicey, her "freehold house known as No. 268 Higham Hill "Road, Walthamstow, aforesaid," and she gave, devised and bequeathed "the rest residue and remainder of my estate both "real and personal whatsoever and wheresoever situate after

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"payment thereof of my just debts funeral and testamentary expenses unto my said son Charles Dacey absolutely."

The testatrix had, in fact, no disposable interest in the two freehold houses which she occupied in Beresford Road, Walthamstow. She was a life tenant only of them under a title derived in the following way: her husband, Charles Dacey, the father of the defendant and the grandfather of the plaintiff, died intestate on October 25, 1938, leaving a widow, the testatrix, the defendant Charles Dacey, his son, and the plaintiff James Julian and his brother Charles Julian, the two sons of his deceased daughter Selina Alice Julian.

In April, 1939, a deed of family arrangement was apparently drawn up by the parties interested under the intestacy, but it had been destroyed by enemy action during the last war and there was no copy of it. The terms of the family arrangement were that the testatrix should occupy two freehold houses known as 68 and 70, Beresford Road, Walthamstow, which her husband, Charles Dacey, had owned, for her life, and on her death, the defendant should become entitled to a half share of the beneficial interest therein, and the two sons of the deceased daughter, that was the plaintiff, James, and his brother Charles, should each be entitled to a quarter.

On a summons to determine questions relating to the construction of the will of the testatrix, Selina Dacey, the question relevant to this report was whether the defendant, Charles Dacey, was bound to elect whether he would take under or against the will.

S. C. Silkin for the plaintiff. The doctrine of election is applicable and the defendant must elect for or against the will. It is clear from the terms of the will that the testatrix intended to dispose of the houses in Beresford Road which were not her property; were it to be held that she was not attempting to dispose of any property other than her own the doctrine of election could not of course apply: *Galvin v. Devereux*.¹

Where a testator by his will disposes of an interest of another person who also takes a benefit under the will, that person is put to his election whether to approbate or reprobate the will: *Padbury v. Clark*.² The testatrix has sufficiently identified the property by the description she has used—the houses in Beresford Road being occupied, although not owned, by her, so that no difficulty arises in that respect: *In re Harris*.³

¹ [1903] 1 I.R. 185.

² (1850) 2 Mac. & G. 298.

³ [1909] 2 Ch. 206.

Usticke v. Peters ⁴ may be said to be on all fours with this case—there the testator attempted to dispose of land in which he had only a life interest. In *In re Booth* ⁵ it was assumed that the doctrine of election would apply in circumstances similar to those of the present case; although the judgment was principally concerned with the question of compensation, it does not appear to have been in dispute that the doctrine of election applied; and there is a statement from *Rogers v. Jones* ⁶ of the principle of election.

This case is unusual in that the plaintiff's brother owns a quarter share in the property and he cannot be asked to compensate, since he takes no interest under the will, but his quarter share is left out of consideration altogether.

On the authorities this will should be construed as showing an intention on the part of the testatrix to give away an interest not possessed by her, and a case of election therefore arises.

J. Hamawi Hames for the defendant. No election arises for two reasons: (1) On the construction of the will, if the words used are not sufficient to identify the subject-matter of the gift, no case of election arises. (2) Alternatively, if the property is identifiable, the defendant is unable to do what the testatrix wished to be done, to give these two freehold properties to the plaintiff.

On the first point, that of the construction of the will, where the words used in the will are insufficient to enable the court to identify the gift so that it can have no idea what was intended, the gift fails and no election therefore arises. That is the extreme case, and it is not the position here. Where, however, a gift is only identifiable by the words of ownership used, and the testator in fact did not own such property, the gift cannot be recognized. Thus the testatrix said "my two freehold houses . . .," but in fact she possessed no freehold houses. There is no case directly in point, but the proposition is illustrated by *Waters v. Wood*,⁷ where a bequest of policies in a company (which the testator did not possess) was held not to pass the shares in the company which the testator did possess. The testatrix here gave property which can only be identified by *her* interest in it, but she has no interest, and the bequest cannot therefore be identified.

Where a testator intends to give the whole of a property and either does not own the whole, or some part of it, the gift fails:

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⁴ (1858) 4 K. & J. 437.

⁶ (1876) 3 Ch.D. 688.

⁵ [1906] 2 Ch. 321.

⁷ (1852) 5 De G. & Sm. 717.

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In re Mulder.⁸ The difference between the description in the will and the interest of the testatrix in the property extends not merely to quantity but also to quality.

Alternatively, even if the property can be identified, the defendant ought not to be put to his election, as he cannot in the circumstances give effect to the intention of the testatrix so as to perfect the gift, as a quarter share of the property is owned by the plaintiff's brother. There are four cases which apply in some measure. The present case is not so strong as *Douglas's Trustees v. Douglas*⁹ or *Brown v. Gregson*¹⁰; but in *In re Vardon's Trusts*¹¹ it was held that the doctrine of election was based on the presumption of a general intention that every part of an instrument should take effect but was rebutted by an inconsistent particular intention. Where the person who would be put to his election has no property out of which he could make compensation, he is not compelled to do so: *In re Lord Chesham*.¹²

*Cooper v. Cooper*¹³ is distinguishable from the present case because, although the defendant receives a benefit under the will, his election cannot make the devise to the plaintiff effective. *In re Booth*,¹⁴ which was relied on, is no authority on the question whether the defendant has to elect, the only issue before the court being that of compensation. The court must first determine whether the doctrine of election is applicable and only then is it concerned with compensation, and the question in that case was essentially one of compensation resulting from election. There is also a distinction between the will in that case and the present will. [Reference was also made to *Howells v. Jenkins*.¹⁵]

To summarize, the defendant does not possess the whole interest in the property which the testatrix purported to give away; no election therefore arises; had the defendant possessed the property, it would have been the classic case of election. The foundation of the doctrine of election is to give effect to the real intention of a testator; the testatrix disclosed her intention in her will and that was to give two freehold properties and not shares in two properties, and for that reason also the doctrine of election does not apply.

⁸ [1943] 2 All E.R. 150.⁹ (1862) 24 D. 1191.¹⁰ [1920] A.C. 860.¹¹ (1885) 31 Ch.D. 275; 2 T.L.R. 204.¹² (1886) 31 Ch.D. 466; 2 T.L.R. 265.¹³ (1874) L.R. 7 H.L. 53.¹⁴ [1906] 2 Ch. 321.¹⁵ (1862) 2 J. & H. 706.

Silkin in reply. With regard to *In re Booth*,¹⁶ unless the question of election did arise there could be no compensation, and the court was considering the matter on the footing that it was a proper case for election. *Brown v. Gregson*¹⁷ merely showed that if there was nothing out of which compensation could be made there was no case for election. Kekewich J. in *Haynes v. Foster*¹⁸ considered that the testator by adding restraint on anticipation showed an intention inconsistent with the application of the doctrine of election, and the fact that the testator's daughter became a widow did not affect that intent.

[DANCKWERTS J. Is not that case overruled? I always thought it was wrongly decided.]

In *In re Ogilvie*,¹⁹ which is a stronger case than *In re Booth*,²⁰ a testatrix attempted to give away to a charity property in Paraguay over which she had no power of testamentary disposition, and it was held that the obligatory heirs had to elect between what they took under Paraguayan law and what the testatrix gave them.

It was argued that *Cooper v. Cooper*²¹ was not applicable because there must be power to give effect to the intention of the testatrix, and that the interest of a third person here prevented that from being done; but that principle must be read subject to some limitation, otherwise a person having only an infinitesimal interest could prevent the application of the doctrine of election. With regard to the equity of the matter, this is an artificial doctrine and should not be extended or adapted so as to make it more artificial.

DANCKWERTS J., having stated the facts, continued: It is contended that, in the circumstances, Charles Dicey, the defendant, who, of course, takes an interest under the will, is put to his election either to give effect to the devise contained in clause 4, so far as he can, or compensate to the extent of his interest received under the will of the testatrix in respect of the dis-appointment of the plaintiff in not receiving the properties in question.

It is to be observed that in any case the plaintiff cannot be compensated in full, because there is his brother, Charles Julian, who takes no interest under the will, and whose quarter cannot be affected by the question of election. It is also to be observed

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¹⁶ [1906] 2 Ch. 321.¹⁹ [1918] 1 Ch. 492.¹⁷ [1920] A.C. 860.²⁰ [1906] 2 Ch. 321.¹⁸ [1901] 1 Ch. 361.²¹ L.R. 7 H.L. 53.

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that in any case the plaintiff is entitled to one-quarter interest beneficially in respect of the houses. Therefore, the question of election can, at the most, only apply to the extent of a half share in the houses to which beneficially the defendant was entitled, which are said to be worth some £750 each in value.

The defendant contends that he is not put to any election at all, and a number of arguments have been put by Mr. Hames on his behalf. First, it was contended by Mr. Hames that there was no effective devise whatever of the two houses, apart from the fact that the testatrix did not own any devisable interest, because there was nothing to identify the houses which were said to be the subject of the devise contained in clause 4. It was said, in effect, that she had no houses and therefore there was nothing to which the description "my two freehold houses in Beresford Road, Walthamstow, aforesaid" could apply. That argument did not appeal to me, because when one knows the history of the matter, and finds that the testatrix was in occupation of two houses, it is obvious what she meant by the words "my two freehold houses in Beresford Road, Walthamstow." She meant the two houses which she occupied as tenant for life. She was mistaken, of course, in her belief that she could dispose of them after her death, but there seems to be not the slightest difficulty in identifying the houses of which she attempted to dispose.

Among the various arguments advanced by Mr. Hames, one which appealed to me somewhat was that in which he said that this was an example of the rule laid down in *Brown v. Gregson*¹ and other cases, particularly in a number of Scottish cases, in which it was said that there was no case of election where the person whose property was concerned was incapable of giving effect to the intention of the devise or bequest by the testator or testatrix. In the present case it was argued that the defendant could not give effect to the bequest or devise in question, because he did not own the two freehold houses absolutely. He can only have an interest in the proceeds of sale to the extent of a half, and the entirety of the houses could only be secured to the plaintiff with the concurrence, of course, of himself and the concurrence of his brother who is not put to any election at all.

It is an argument which seemed to me to have some force, but I think it cannot prevail in face of two cases which I must mention. The first is *In re Booth*,² where the doctrine of election is very well stated by Swinfen Eady J., quoting Sir George

¹ [1920] A.C. 860.

² [1906] 2 Ch. 321.

Jessel M.R. in *Rogers v. Jones*³ in this form⁴: “ ‘ If a person
 “ ‘ whose property a testator affects to give away takes other
 “ ‘ benefits under the same will, and at the same time elects to
 “ ‘ keep his own property, he must make compensation to the
 “ ‘ person affected by his election to an extent not exceeding the
 “ ‘ benefits he receives.’ ” That is plainly the correct way of
 stating the principle: it is not a question of forfeiture but simply
 a question of compensation.

It is true that *In re Booth*⁵ was a case principally concerned
 with the question of the amount of compensation and the persons
 who were liable to compensate rather than a question as to who
 was put to election. There were, however, a number of persons
 concerned in the case, and it seems to me that, in view of the
 situation in *In re Booth*,⁵ which was a somewhat complicated
 one, the argument put forward by Mr. Hames is not really
 sustainable. The matter becomes even clearer on looking at
 the decision of Younger J. in *In re Ogilvie*.⁶ There the testatrix
 attempted to deal with property which she owned in Paraguay,
 while, under the law of Paraguay, she could only dispose of one-
 fifth, and the remaining four-fifths of the property would be the
 portion of the obligatory heirs according to the law of Paraguay
 and, therefore, it was not an interest of which she could dispose.
 The situation in that case and the observations of Younger J. are
 quite inconsistent with the argument which has been put forward
 by Mr. Hames, and I must therefore come to the conclusion
 that the question of election does apply in the present case, that
 is to say, to the extent only, of course, of his half interest in
 the property of which the testatrix attempted to dispose, the
 defendant Charles Dicey is put to his election whether to give
 effect, in so far as he can, to the whole of the terms of the
 will of the testatrix. He may decide to elect in favour of the
 will (or approbate, as Scottish lawyers put it) and he would then
 have to give up the whole of his share in the properties in
 question. On the other hand, if he decides to reprobate, or elect
 against the will, he is under an obligation to compensate to a
 maximum which is limited on the one hand by the value of a
 half interest in the two properties in question and, on the other
 hand, by the total value of the interest which he takes under
 the provision of the will of the testatrix. That, therefore, will be
 the limit of his compensation. He has not yet, as I understand

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³ (1876) 3 Ch.D. 688.⁵ [1906] 2 Ch. 321.⁴ [1906] 2 Ch. 325.⁶ [1918] 1 Ch. 492.

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it, elected, but it seems to me that he is bound, within a reasonable time, to decide one way or the other, and, accordingly, the matter will have to be dealt with on that footing.

That being so, I will declare, first of all, that the property of which the testatrix attempted to dispose by clause 4 of her will is the two freehold houses in Beresford Road, Walthamstow, aforesaid, known respectively as Nos. 68 and 70, Beresford Road. I will make a declaration that the defendant, Charles Dacey, is put to his election whether to affirm the terms of the said devise or compensate the plaintiff in accordance with the ordinary principles of election.

Declaration accordingly.

Solicitors: *Montlake & Co.; Craigen, Wilders & Sorrell.*

I. G. R. M.

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 Mar. 22.

In re HEYWORTH'S CONTINGENT REVERSIONARY
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[1955 H. 4266.]

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Trust and Trustee—Variation of trusts—Jurisdiction of Chancery Division—Proposed sale of infant's reversionary interest in personal estate—Proposal beneficial to infant—Jurisdiction of court to sanction—Trustee Act, 1925 (15 & 16 Geo. 5, c. 19), s. 53.
Trust and Trustee—Maintenance of infant.

By a conditional agreement, dated January 9, 1956, it was agreed between a tenant for life under two settlements and the reversioners expectant on her death that the tenant for life should purchase the contingent reversionary interests. The arrangement was made in order that the reversioners might receive an immediate absolute interest in a sum of cash in exchange for their future contingent interests. One of the reversioners was an infant; the proposed transaction, though for her benefit, was not necessary for her education or maintenance.

On an application to the court under section 53 of the Trustee Act, 1925,¹ and under the inherent jurisdiction to sanction the sale of the infant's interests:—

¹ Trustee Act, 1925, s. 53:
 "Where an infant is beneficially
 "entitled to any property the court
 "may, with a view to the applica-
 "tion of the capital or income thereof
 "for the maintenance, education, or
 "benefit of the infant, make an
 "order—(a) appointing a person to
 "convey such property; or (b) in the

"case of stock, or a thing in action,
 "vesting in any person the right to
 "transfer or call for a transfer of
 "such stock, or to receive the divi-
 "dends or income thereof, or to sue
 "for and recover such thing in action,
 "upon such terms as the court may
 "think fit."

Held, that the agreement was not entered into "with a view to "the application" of—for the purpose of applying—the capital or income for the maintenance, education, or benefit of the infant, but was intended to put an end to the trusts created by the settlements by enlarging the interest of the life tenant to include reversionary interests by means of their sale for cash, and there was no jurisdiction under section 53 to sanction the arrangement.

Held, also, that there was no power to approve the deed under the inherent jurisdiction of the court, it being clear from the authorities that there is no inherent jurisdiction to deal with an infant's interest and to alter trusts, merely because it is for the benefit of the infant.

Chapman v. Chapman [1954] A.C. 429; [1954] 1 All E.R. 798 applied.

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By a settlement, dated March 3, 1931, a trust fund was settled on the following trusts: "(3) The trustees shall hold the income "of the trust fund in trust for [the settlor's daughter Florence "Parkinson Heyworth] during her life; (4) after the death of the "said Florence Parkinson Heyworth the trustees shall hold the "trust fund in trust for all the children of the said Florence "Parkinson Heyworth who shall be living at her death and who "being sons have attained or shall attain the age of 21 years or "being daughters have attained or shall attain that age or marry "under that age and if there shall be only one such child the "whole to be in trust for that child Provided always that if any "child of the said Florence Parkinson Heyworth shall have died "in her lifetime leaving a child or children who shall survive her "and who being a son or sons shall attain the age of 21 years or "being a daughter or daughters shall attain that age or marry "under that age then and in every such case the last mentioned "child or children shall take (and if more than one equally "between them) the share which his her or their parent would "have taken in the trust fund if such parent had survived the "said Florence Parkinson Heyworth and attained the age of "21 years."

By a settlement dated July 10, 1935, a trust fund was settled on the following trusts: "(3) The trustees shall hold the income "of the trust fund in trust for the said Florence Parkinson "Heyworth during her life without power of anticipation during "any coverture: (4) After the death of the said Florence Parkin- "son Heyworth [on trusts identical with those contained in "para. 4 of the settlement of March 3, 1931, as above set out]."

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Both settlements contained ultimate trusts in favour of other contingent classes of persons in the event of none of the foregoing classes attaining vested interests.

In February, 1955, Florence Parkinson Heyworth had attained the age of 74 years and was a widow, having had two children only, namely, Mary Mercia Scott and Brian Kay Heyworth. Mary Mercia Scott was upwards of 47 years of age and had had two children. Brian Kay Heyworth was married and died on May 28, 1940, having had two children only, namely, Michael Collinge Heyworth and Susan Mary Heyworth, who would attain the age of 21 years on May 19, 1956. The widow of Brian Kay Heyworth married secondly Thomas Gwyn Richards on November 6, 1948.

By a conditional agreement dated January 9, 1956, the parties beneficially interested in remainder under the settlements agreed with Florence Parkinson Heyworth for the purchase by her from the reversioners expectant on her death of their respective contingent reversionary interests.

A summons was taken out on the application of the infant by Elizabeth Richards (her mother and next friend) for the following relief under section 53 of the Trustee Act, 1925, namely: “(1) that the conditional agreement . . . providing “so far as material hereto for the sale to Florence Parkinson “Heyworth at the prices of £2400 and £1350 respectively of the “contingent reversionary interests to which the infant applicant “is beneficially entitled in the property [comprised in the two “settlements] may be approved and the respondent trustees “appointed to convey the said interests and to receive the said “purchase moneys upon trust for the infant applicant and to “give discharges therefor with a view to the application of the “capital or income thereof for her maintenance education or “benefit: (2) an order that the respondent trustees shall be at “liberty to apply the income of the said purchase moneys for “the maintenance education or benefit of the infant applicant.”

Raymond Jennings Q.C. and *J. A. Armstrong* for the infant applicant. The proposed transaction can be effectuated by the court either under section 53 of the Trustee Act, 1925, or under the inherent jurisdiction.

As to the statutory jurisdiction, section 53 is to be given a liberal construction: *In re Gower's Settlement*.² The words “application” and “benefit” are both words of wide import,

² [1934] Ch. 365.

and a transaction which provides an infant with a sum certain in exchange for a contingent share of a fund is an "application" of the "capital" of the infant's property for her "benefit": cf. *In re Vestey's Settlement*.³ That is the purpose of the present transaction so far as the infant is concerned.

As to the inherent jurisdiction, the authorities establish three propositions. The first is that the court has no jurisdiction to dispose of the real estate of an infant merely because it is for his benefit, although the court can do so by way of salvage or to provide maintenance: see *Calvert v. Godfrey*⁴; *In re Jackson*⁵; *In re De Teissier's Settled Estates*⁶; *Camden (Marquis) v. Murray*⁷; *In re Howarth*⁸; *In re Hamilton*⁹; *In re Badger*.¹⁰

The second proposition is that, conversely, the court has jurisdiction to dispose of the personal property of an infant merely because it is for his benefit: see *Taylor v. Philips*¹¹; *Ashburton v. Ashburton*.¹² For an example where an infant's reversionary interest in personal property was sold by the court, see *Nunn v. Hancock*.¹³

The third proposition is that when an infant's property was sold the court did not ordinarily allow conversion from realty to personalty or vice versa. And if there was conversion the relative rights of heir and next-of-kin were preserved: see *Ashburton v. Ashburton*¹⁴; *Wallace v. Greenwood*¹⁵; *Attorney-General v. Marquis of Ailesbury*¹⁶; *Bridges v. Bridges*.¹⁷ [Reference was also made to *D'Eyncourt v. Gregory*¹⁸; *Simpson on Infants*, 3rd ed., pp. 289-290; 4th ed., pp. 221-222; *Seton's Judgments and Orders*, 7th ed., vol. 2, pp. 979-980.]

The application in *Chapman v. Chapman*¹⁹ did not relate to a sale of an infant's property but to an alteration of the trusts of a settlement, and it has no bearing on the present application. It is submitted that in accordance with the propositions above referred to the court has power under its inherent jurisdiction to sanction the proposed sale. [*In re Wells*²⁰ was also referred to.]

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³ [1951] Ch. 209; [1950] 2 All E.R. 891.

⁴ (1843) 6 Beav. 97.

⁵ (1882) 21 Ch.D. 786.

⁶ [1893] 1 Ch. 153; 9 T.L.R. 62.

⁷ (1880) 16 Ch.D. 161, 170.

⁸ (1873) L.R. 8 Ch. 415.

⁹ (1885) 31 Ch.D. 291.

¹⁰ [1913] 1 Ch. 385.

¹¹ (1750) 2 Ves.Sen. 23.

¹² (1801) 6 Ves. 6.

¹³ (1871) L.R. 6 Ch. 850.

¹⁴ 6 Ves. 6.

¹⁵ (1880) 16 Ch.D. 362, 365-366.

¹⁶ (1887) 12 App.Cas. 672; 3 T.L.R. 830.

¹⁷ (1887) 12 App.Cas. 693 (n. (2)).

¹⁸ (1876) 3 Ch.D. 635.

¹⁹ [1954] A.C. 429; [1954] 1 All E.R. 798.

²⁰ [1903] 1 Ch. 848.

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[UPJOHN J. Mr. Brightman, I should like you, as amicus curiae, to suggest any observations contrary to the contentions on behalf of the applicant, as I have no argument to the contrary.]

J. A. Brightman for the respondent trustees. There is everything to be said for allowing the present application, provided that the court has jurisdiction. It is for the benefit of the infant, because she will receive more money. The phrase "with a view "to" in section 53, however, means "for the purpose of" and, on that submission, section 53 cannot be invoked unless it is established that the summons is issued for the purpose of the application of the money for the "maintenance, education, or "benefit" of the infant. To give the court jurisdiction it must be shown that the purpose of the fund is to produce money for the infant's maintenance, education, or benefit. The scope of the section is restricted.

To succeed, the applicant must show that the view or purpose is to obtain something for the infant. If the legislature had meant the section to have a wider scope, it would seem that some provision would have been inserted on the lines of section 57 of the statute. The wording of section 53 is restricted.

In construing "with a view to" as being the equivalent of "for the purpose of," the purpose must be established before section 53 can be invoked. Here the "view" is the benefit of the realization of the infant's property and it is not a question of maintenance and education.

Except for the last paragraph, the whole of the summons is concerned with the application of the property. It would be beneficial to the infant to have available the extra income which would arise from the transaction.

Jennings Q.C. replied.

Cur. adv. vult.

March 22. UPJOHN J. The infant applicant, Susan Heyworth, who will be 21 on May 19 next, is one of a class contingently interested in capital of two settlements dated respectively March 3, 1931, and July 10, 1935, subject to the life interest in each case of her grandmother Florence Heyworth, a lady of some 74 years of age. Under the terms of each settlement, the class who are entitled to capital are those children of Mrs. Heyworth living at her death, who attain 21, with a proviso substituting the children of any child dying in her lifetime who attain 21 or being daughters marry and who survive Mrs. Heyworth.

Mrs. Heyworth had two children, a daughter, Mrs. Scott, who herself has two children, and a son, Brian, who died in 1940 leaving two children, a son Michael who has attained 21 and the infant Susan.

Accordingly, the class of those contingently entitled consists of Mrs. Scott and her children, who will step into her shoes, if Mrs. Scott does not survive her mother, Brian and Susan.

There are some ultimate trusts in favour of other contingent classes of persons in the event of none of the foregoing class attaining vested interests, but I need not consider them in detail; they differ in the two settlements.

The parties beneficially interested under the settlements have now come to an extremely sensible and very beneficial arrangement embodied in a deed of January 9, 1956, which I am asked to sanction on behalf of Susan.

Briefly, the arrangement is that Mrs. Heyworth, who is the fortunate owner of very large free assets, has agreed to purchase for cash from the reversioners expectant on her death their respective contingent reversionary interests. This familiar operation has, as the law at present stands, very substantial fiscal advantages. The sums which Mrs. Heyworth pays to the reversioners will not, it is said, be liable to estate duty, however soon Mrs. Heyworth should die after the transaction is completed. She can, therefore, make immediate provision for her family and at the same time will greatly reduce the rate and amount of duty payable on her death.

Mrs. Heyworth, as the evidence shows conclusively, is offering immediate payment to the reversioners, and in particular Susan, of sums which are substantially in excess of the present actuarial value of the respective reversions and, what is perhaps more realistic, substantially in excess of the sums which will be receivable on her death, unless there is in the meantime some wholly unexpected and sharp fall in the rate of estate duty.

Furthermore, during the hearing, an offer was made to secure by a policy of life insurance that Susan should not suffer, should the class be decreased during her grandmother's lifetime, by the death of her brother or aunt and cousins.

The arrangement is one which is most advantageous from the point of view of the infant in almost every conceivable circumstance, and, if I have jurisdiction to do so, I shall most certainly sanction it. I thought at first that, as the infant's twenty-first birthday is so near, I ought to leave her to decide whether or not to execute the deed, but I have been persuaded not to reject this

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application on that ground, for it is obvious that she will execute it on attaining that age. There is no real decision to be made by her, for she will get immediately more than she would get on her grandmother's death if she survives, while, on the other hand, there is always a risk that her grandmother may die before the infant's next birthday, although there is no suggestion that her health is other than normal for a lady of her age.

The application was made originally under section 53 of the Trustee Act, 1925, but at a later stage in the argument reliance was also placed on the inherent jurisdiction of the court.

Section 53 is in these terms: [His Lordship read the section and continued:] It is to be observed that the section does not authorize the court to convey an infant's property merely because it is for his or her benefit, but only "with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant."

It was faintly suggested in evidence that this transaction was necessary in order to provide an income to enable Susan to continue her training in London as a student nurse and, if that had been established, I do not doubt that the court has ample jurisdiction to sanction the arrangement, but the facts did not bear serious examination. Susan has, in fact, been maintained as a student nurse out of other funds for nearly two years, although admittedly by way of advances rather than out of income, and it cannot be seriously suggested that this deed is necessary to enable her to be maintained down to her twenty-first birthday. Susan will then obviously execute the deed on attaining her majority, so no post-infancy period can be called in aid and Mr. Jennings did not seriously press this point.

I accept also the argument that the phrase "maintenance, education, or benefit" are words of the widest import. It covers not merely expenditure but capital investment such as the purchase of a house to live in or a share in a partnership, or even in some cases placing of money on deposit for an infant: *In re Vestey's Settlement*.¹

However, to bring the jurisdiction into play, there must be "a view to the application" of the capital or income for the maintenance, education or benefit of the infant. Mr. Jennings concedes that that phrase is equivalent to "for the purpose of applying." Shorn of the niceties of legal argument, this deed is intended to put an end to the trusts created by the settlement, by enlarging the interest of the life tenant to include some or all

¹ [1951] Ch. 209; [1950] 2 All E.R. 891.

of the reversioners' interests by means of a sale of those reversionary interests for cash. The infant (inter alios) receives an immediate absolute interest in a sum of cash in exchange for a future contingent interest. The deed is not in the least degree entered into with a view to the application of, or for the purpose of applying, any capital or income of the infant for her benefit.

If I sanctioned this scheme on behalf of the infant I should be reading the section as though it empowered the court to convey the property of an infant whenever it was for her benefit. Unfortunately, the section only confers a more limited jurisdiction.

In my judgment I have no jurisdiction to sanction this arrangement under the section.

I turn to the question of the inherent jurisdiction. The authorities clearly establish the proposition that there is no jurisdiction to sell real estate and formerly copyhold estate of an infant merely because it is for his or her benefit, save in what are usually called the salvage cases or to provide the infant with necessities.

The authorities on the position with regard to the personal estate of an infant are not quite so clear. The court, on occasion, appears to have ordered a sale of an infant's contingent reversionary interest in personalty, as in *Nunn v. Hancock*,² a case strongly relied on by the applicant, but the circumstances in which it did so do not emerge from the report.

In some of the early cases it may be that the court was prepared to take greater liberties with the personal estate of an infant than with real or copyhold estates: see *Taylor v. Philips*.³ However, none of the authorities cited to me establish clearly any general proposition that a court will sell an infant's property in the sense of altering the nature of his beneficial interest (and not merely transposing his interest, for example, by selling personalty and investing it in realty) merely because it is for his or her benefit. It does so when it is necessary for the maintenance of the infant or in the salvage cases.

In relation to personal estate section 53 of the Trustee Act, 1925, may be taken as declaratory of the existing law.

Further reference to the earlier authorities is, however, unnecessary because all the speeches in the House of Lords in *Chapman v. Chapman*,⁴ make it perfectly clear that there is no inherent jurisdiction to deal with an infant's interest and to alter trusts merely because it is for the benefit of the infant.

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² (1871) L.R. 6 Ch. 850.

⁴ [1954] A.C. 429.

³ (1750) 2 Ves.Sen. 23.

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INTEREST,
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There is no question here of maintenance of the infant, compromise of rights or salvage of the property, nor can this transaction with any semblance of truth be described as being a mere change in the nature of the investment.

It is said that this is not a case of altering trusts, but of selling the infant's interest; but that, with all respect, is a mere play upon words. Whenever the trusts of an instrument are sought to be varied or terminated, that involves a sale or disposition of the original interest for cash or in exchange for some other interest. The net result is that, if the transaction goes through, then the trusts are varied or terminated.

I have no jurisdiction to sanction or approve the deed under the inherent jurisdiction of the court.

I, therefore, dismiss this application.

Application dismissed.

Solicitors: *Sandilands, Williamson, Hill & Co. for Marsden & Marsden, Blackburn.*

J. L. D.

1956

Mar. 28.

Upjohn J.

In re COCKERELL'S SETTLEMENT TRUSTS.

[1955 C. No. 2835.]

Trust and Trustee—Variation of trusts—Jurisdiction of Chancery Division—Settlement of reversionary interest—Application for power of sale—Sale beneficial to settlement—Avoidance of death duties—No variation of trusts of settlement—Sale authorized—Trustee Act, 1925 (15 & 16 Geo. 5, c. 19), s. 57. Settlement—Power of sale.

A settlement of a reversionary interest contained no power to sell that interest until it fell into possession. Application to the court was made under section 57 of the Trustee Act, 1925, that the trustees might be authorized to sell the interest to the person on the life of whom the interest was expectant, the object of the sale being to avoid some measure of death duties:—

Held, that the sale, which was for the benefit of the settlement, involved no variation of the trusts therein, and fell fairly and squarely within the terms of section 57 of the Act, and would accordingly be authorized by the court.

In re Heyworth, ante, p. 364, distinguished.

Dictum in *In re Chapman's Settlement Trusts* [1953] Ch. 218; [1953] 1 All E.R. 103 applied.

SUMMONS.

By this application under section 57 of the Trustee Act, 1925,¹ the applicant, John Lawrence Pepys Cockerell, tenant for life under a settlement dated January 27, 1948, asked that the National Provincial Bank Ltd., as the trustees of the settlement, might be authorized to sell to his mother, Mrs. Felicia Marie Cockerell, a one-third part or share of a reversionary interest expectant on her death which had been settled by the settlement.

The reversionary interest was settled in the following circumstances: Under the will made on July 25, 1913, of the applicant's grandfather, who died on September 11, 1913, and under an appointment made pursuant to powers conferred by the will, the applicant was entitled to a two-thirds' interest in the residuary estate of his grandfather, subject to the life interest of his mother, Mrs. Cockerell, who was now aged some 65 years.

By the settlement of 1948 the applicant settled one-half of his two-thirds' reversionary interest (i.e., one-third of the reversionary estate) on trusts not here relevant, but on an administrative trust under which the bank should sell that reversionary interest when it fell into possession. There being no power to sell the interest while it was in reversion, the court was asked to confer that power on the bank.

The summons was argued in chambers, but judgment was given in open court.

W. S. Wigglesworth for the applicant.

T. A. C. Burgess for the National Provincial Bank Ltd., trustees of the settlement.

W. T. Elverston for the infant defendants.

UPJOHN J., having stated the facts, continued: The circumstances in which I am asked to confer a power of sale are these: Confessedly to avoid payment of some estate duty upon her death, Mrs. Cockerell is anxious to purchase this reversionary interest so as to enlarge her life interest into an absolute interest, and she has ample means to do this. With the present rate of estate duty the value of this reversionary interest which will be received

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¹ Trustee Act, 1925, s. 57: "(1) 'Where in the management or administration of any property vested in trustees, any sale . . . is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trust-

'tees by the trust instrument . . . 'the court may by order confer upon 'the trustees . . . the necessary power 'for the purpose, on such terms, 'and subject to such provisions and 'conditions, if any, as the court may 'think fit. . . .'

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on her death is some £44,000. The price which Mrs. Cockerell is willing to pay is some £80,000.

It seems to me quite plainly to be for the benefit of the settlement of 1948 that this sale should be permitted. The trustees will receive a very much larger sum immediately in cash than they would receive upon the death of a lady now aged 65. The evidence also shows it to be fair from an actuarial value. It seems to me plain, therefore, that the transaction is for the benefit of the estate, and that it falls fairly and squarely within the terms of section 57 of the Trustee Act, 1925. There is property vested in the trustees; the proposed transaction is plainly expedient; it is clear, however, that it cannot be effected because there is no power to enter into a sale while the property is reversionary. I propose, therefore, to sanction it under section 57 of the Trustee Act.

I only desire to add this, that there is no conflict between the order that I am making today and my recent decision in *In re Heyworth*.¹ In that case I refused to sanction the sale of a reversionary property belonging to an infant. In the first place, the parties in that case could not bring themselves within section 53 of the Trustee Act, because on the facts there was no view to applying the capital or income for the maintenance, education or benefit of the infant; and, secondly, I held that there was no jurisdiction to sell the reversionary interest of an infant merely because it was for her benefit, for the effect was in fact to alter the trusts declared by the settlement, and the court has no general jurisdiction to do that.

But this is quite a different case. Here the trust property is a reversionary interest. The effect of my order will not in the least degree alter any of the trusts subsisting under the settlement of 1948. I am merely authorizing a sale of the trust property, there being no power to do so in the settlement.

It seems to me that this case falls entirely within *In re Wells*.² The observations of the Court of Appeal in relation to that case in *In re Chapman's Settlement Trusts*³ were quoted with approval by Lord Morton in his speech in the House of Lords in *Chapman v. Chapman*.⁴ I propose only to read the concluding observations of the Court of Appeal⁵: "No alteration was required of any of the trusts of these settlements. What was proposed was that

¹ Ante, p. 364.

² [1903] 1 Ch. 848.

³ [1953] Ch. 218; [1953] 1 All E.R. 103.

⁴ [1954] A.C. 429; [1954] 1 All E.R. 798.

⁵ [1953] Ch. 218, 243.

“the trustees of the settlements should receive a present and certain subject-matter instead of their previously existing contingent rights.”

It seems to me, therefore, that I can properly give authority to enter into this transaction, and I do so accordingly.

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Order accordingly.

Solicitors: *E. F. Turner & Sons.*

I. G. R. M.

LEVER FINANCE LTD. v. TRUSTEE OF THE PROPERTY
OF L. N. AND H. M. NEEDLEMAN (BANKRUPTS)
AND KREUTZER.

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Apr. 26, 27.

Harman J.

[1955 L. No. 2582.]

Mortgage—Leasing, power of—Express provision—Statutory power of leasing excluded except with consent of mortgagee—Provision that lessee not to be concerned to see consent given—Grant of tenancy without obtaining consent—Estoppel of mortgagee as against tenant—Receipt of rent by mortgagee's agent—Right of mortgagee to possession as against tenant—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 109 (2).

Land Registration—Mortgage—Receiver—Purported appointment of receiver by mortgagee when not registered as proprietor of a charge—Land Registration Act, 1925 (15 & 16 Geo. 5, c. 21), ss. 33, 34.

Estoppel—Conduct, by.

A mortgage deed made in 1952 charged by way of legal mortgage certain leasehold property, the title whereof was registered. The deed contained the following provision: “The mortgagors shall not “except with the consent in writing of the mortgagees exercise the “powers of leasing . . . conferred by the Law of Property Act, “1925, on a mortgagor while in possession but it shall not be “necessary to express such consent in any such lease . . . nor shall “any lessee be concerned to see that any such consent has been “given.”

In 1953 the mortgagors (whose trustee in bankruptcy was the first defendant) without obtaining the consent of the mortgagees leased part of the property for a term of 21 years to L., who subsequently assigned his term to the second defendant. In 1955 the plaintiff company took a transfer of the legal charge from the original mortgagees and thereafter, but before it was registered as proprietor of the charge, purported to appoint a receiver who demanded, and received, rent from the second defendant. The plaintiff company now sought possession of the property:—

[Reported by P. G. GALLICHAN, Esq., Barrister-at-Law.]

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Held, that the plaintiff company was not entitled to possession of that part of the property occupied by the second defendant as the provision that a lessee should not be concerned to see that consent had been given estopped it from asserting that the lease had been granted without its consent.

Dudley and District Benefit Building Society v. Emerson [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252 distinguished.

Per curiam. By reason of sections 33 and 34 of the Land Registration Act, 1925,¹ the plaintiff company was not in a position to exercise its statutory power to appoint a receiver at a time when it was not registered as proprietor of the charge. Accordingly, the so-called receiver remained the agent of the plaintiff company and the receipt of rent by him from the second defendant constituted a recognition by the plaintiff company that some tenancy existed in respect of the part of the property leased, but *quaere* whether it constituted recognition of the lease actually granted.

Seemle, that the receipt of rent by a properly appointed receiver did not constitute a recognition of a tenancy by a mortgagee, as by virtue of section 109 of the Law of Property Act, 1925, he was to be regarded as the agent of the mortgagor and not of the mortgagee.

ADJOURNED SUMMONS.

The facts are taken substantially from the judgment. On March 14, 1952, the property, 142, Broadhurst Gardens, Hampstead, N.W.6, which was registered land, was leased to Leslie Needleman and Harry Mark Needleman for a term of 63 years from Christmas, 1951. On the same date these persons charged the property by way of legal mortgage to Dowson, Wasbrough and Fisher to secure repayment of the sum of £3,600 then lent to them. Both lease and charge were registered in the Land Registry on March 29, 1952.

Clause 8 of the charge provided as follows: "The mortgagors shall not except with the consent in writing of the mortgagees exercise the powers of leasing or of agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act, 1925, on a mortgagor while in possession but it shall not be necessary to express such consent in any such lease, agreement or surrender nor shall any lessee be concerned to see that any such consent has been given."

¹ Land Registration Act, 1925, s. 33: "(1) The proprietor of any registered charge may, in the prescribed manner, transfer the charge to another person as proprietor. (2) . . . the transferor shall be deemed to remain proprietor of the charge until the name of the trans-

feree is entered on the register in respect thereof."

S. 34: "(1) Subject to any entry on the register to the contrary, the proprietor of a charge shall have and may exercise all the powers conferred by law on the owner of a legal mortgage."

On February 23, 1953, the mortgagors, without obtaining the leave of their mortgagees, let the first floor of the property to one Lifschütz for a term of 21 years. This sublease was not put on the register, being a 21-year term only in possession. On March 24, 1954, Lifschütz assigned his sublease, with the consent of the mortgagors, to the second defendant and her daughter jointly.

On August 26, 1954, a second legal charge on the property was executed in favour of the plaintiff company, which was duly registered as proprietor thereof. On March 23, 1955, the mortgagors gave notice to the second defendant and her daughter authorizing them to pay future rent to the plaintiff. On the same day the mortgagors committed an act of bankruptcy which eventually resulted in their adjudication on May 13, 1955, their trustee being the first defendant.

On the same March 23 the plaintiff demanded rent of the second defendant and her daughter, and on March 31, 1955, made a similar demand. On April 19, 1955, the plaintiff took a transfer of the first legal charge from Dowson, Wasbrough and Fisher, and thus became both first and second chargees. On April 21, 1955, the plaintiff appointed, or purported to appoint, a receiver in the exercise of the statutory powers of a mortgagee under the Law of Property Act, 1925. The terms of the purported appointment made it clear that the plaintiff made the appointment in its capacity as first chargee only. In fact at the date of this appointment the plaintiff had not been registered as proprietor of the first charge. On May 5, 1955, and on June 22, 1955, the receiver demanded payment of rent to him, and on June 29, 1955, gave a receipt for a quarter's rent to the second defendant. On July 10, 1955, the plaintiff was registered as proprietor of the first charge. There was a further demand for rent by the receiver on September 19, 1955, and a further receipt from him at Michaelmas, 1955.

On October 31, 1955, the plaintiff served notice to quit the property on the mortgagors or the first defendant, their trustee in bankruptcy (there was no evidence to show which). On November 16, 1955, the plaintiff issued the originating summons in this action, taken out under R.S.C., Ord. 55, r. 5A, and asking for possession. It appeared, although it was not in evidence, that the plaintiff had in fact recovered possession as against the first defendant of all except the first floor of the property, which was in the occupation of the second defendant and her daughter.

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At the hearing the material question was whether the plaintiff was entitled to recover possession in its capacity as first chargee. The question whether the plaintiff could recover possession as second chargee was not raised.

Ivor S. Richard for the plaintiff. The statutory power of leasing was excluded and accordingly there was no power in the mortgagors to create a tenancy binding on the mortgagees: *Dudley and District Benefit Building Society v. Emerson*.² The failure of the plaintiff company to disavow the tenancy does not prevent it from treating the second defendant as a trespasser: *In re O'Rourke's Estate*³ and *Parker v. Braithwaite*.⁴ The receipts of rent by the receiver do not constitute a recognition of the tenancy by the plaintiff company since by virtue of section 109 of the Law of Property Act, 1925, the receiver is the agent of the mortgagors.

P. M. H. Mottershead for the second defendant. The lease under which the second defendant is in possession binds the plaintiff company since the provision in clause 8 of the charge that a lessee is not to be concerned to see that consent has been given estops the plaintiff from asserting that consent has not been given: *Public Trustee v. Lawrence*.⁵ Alternatively, the plaintiff company has by its conduct recognized the tenancy by receiving rent through the receiver who was its agent. It is true that section 109 of the Law of Property Act, 1925, provides that a receiver is the agent of the mortgagor but it does not thereby follow that he ceases to be the agent of the mortgagee: *Serjeant v. Nash, Field & Co.*⁶; *Johns v. Pink*.⁷ But in any case section 109 only applies to the appointment of a receiver made under the Law of Property Act, 1925. Here the appointment was not so made, first, because the plaintiff was not registered as proprietor of the first charge at the time when it made the appointment and accordingly, by virtue of sections 33 and 34 of the Land Registration Act, 1925, it was not in a position to exercise its statutory power to appoint a receiver, and, secondly, because the appointment was made shortly after the mortgagors had committed an act of bankruptcy but the plaintiff has not shown compliance with section 110 (1) of the Law of Property Act, 1925.

The first defendant did not appear and was not represented at the hearing.

² [1949] Ch. 707; 65 T.L.R. 444;
[1949] 2 All E.R. 252.

³ (1889) 23 L.R.Ir. 497.

⁴ [1952] 2 T.L.R. 731; [1952] 2
All E.R. 837.

⁵ [1912] 1 Ch. 789.

⁶ [1903] 2 K.B. 304.

⁷ [1900] 1 Ch. 296; 16 T.L.R. 70.

HARMAN J. This is an originating summons under Ord. 55, r. 5A, taken out by the mortgagee and asking for possession only. The statutory assign of the mortgagors is a trustee in the bankruptcy of Leslie Needleman and Harry Mark Needleman, they having been adjudicated bankrupt in their firm name, and their property, therefore, having become vested in the trustee, who does not appear and has not opposed the order. The second defendant is one of the persons in occupation of the first floor of the mortgaged premises, and the dispute has been with her, the plaintiff saying that it has no connexion, contractual or otherwise, with her, and is entitled to treat her as a trespasser. It is clear law that a mortgagee is not concerned, in a case where he wishes to take possession, with persons he may find upon the premises unless they are there in some way with his consent, because he is concerned only with the mortgagor.

The modern authority for that proposition is *Dudley and District Benefit Building Society v. Emerson*,¹ a case which was overlaid by questions under the Rent Restrictions Acts, but in which it was decided that those Acts were irrelevant and that the mortgagee might treat a person in occupation as a trespasser, even though he might in some circumstances have been protected by the Acts. In his judgment the Master of the Rolls² quoted this passage from the judgment of Lord Selborne in *Corbett v. Plowden*³: “‘If a mortgagor left in possession grants a lease “‘without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease “‘by an agreement under which possession is taken, or a legal “‘lease by actual demise) the lessee has a precarious title, inas- “‘much as, although the lease is good as between himself and “‘the mortgagor who granted it, the paramount title of the “‘mortgagees may be asserted against both of them.’” The plaintiff accordingly contends that Mrs. Kreutzer has no title against it, and that it may oust her from possession.

Mrs. Kreutzer resists that under a number of headings; and I think before the Master, when the matter was, as I gather, argued, the Master having jurisdiction to make an order himself, the point taken was that the actions of the plaintiff as mortgagee had created a new tenancy between it and Mrs. Kreutzer by recognizing her position as tenant in the house. The case has been adjourned to me on the master's decision, although, of course, it is not an appeal.

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¹ [1949] Ch. 707; 65 T.L.R. 444;
[1949] 2 All E.R. 252.

² [1949] Ch. 707, 714.

³ (1884) 25 Ch.D. 678.

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[His Lordship stated the facts and continued:] The first point now taken arises out of the form of clause 8 of the legal charge, a form which I have never seen before. It starts by excluding in plain terms the mortgagors' statutory power of leasing, which, of course, it will be remembered, is a power to grant a lease of 21 years in a case of this sort. If that were all, it would be clear that the mortgagors could create no estate in the property by a lease good against their mortgagee without the mortgagee's consent. It is further clear that the mortgagors, in creating the lease of February 23, 1953, did not obtain consent. But the last three lines of the clause contain this strange provision: "but it shall not be necessary to express such consent in any such lease, agreement or surrender"—that is merely a matter of form; then come the important words—"nor shall any lessee be concerned to see that any such consent has been given."

It is argued that the result, so far as any lessee is concerned, is to free the mortgagors from the restrictions contained in the earlier part of the clause. It is said that the grant of a lease without consent may be a breach by the mortgagors as between them and the mortgagee of the terms of the mortgage deed, which may give some rights to the mortgagee against them; but that they can, having regard to those words, create a good lease.

In support of that proposition the case of *Public Trustee v. Lawrence*⁴ was cited. The mortgage in that case contained an extension of the mortgagors' statutory power of leasing giving them a power to lease for any term not exceeding one thousand years, with a proviso that a counterpart of any such lease, duly executed by the lessee, be delivered to the mortgagees within a month, and that the consent thereto of the mortgagees should not be required. There must be imposed upon that, having regard to what Swinfen Eady J. said, the provision in subsection (11) of section 18 of the Conveyancing Act, 1881, which dealt with such deeds: "but the lessee shall not be concerned to see that this provision is complied with." It was held that the lease under the extended power was valid, even if no counterpart was delivered. In that case there was the requisite power in the mortgagor, which was, as the judge must have held, not cut down by the proviso, which bound the mortgagor to deliver a counterpart in due course, but absolved the lessee from the mortgagor from being concerned to see that that was done. In that case there was no difficulty in coming to the conclusion that the lease as between the mortgagee and the lessee was good in spite

⁴ [1912] 1 Ch. 789, 793.

of the mortgagor's default. In his judgment Swinfen Eady J. said: "The result is that failure to deliver a counterpart to the "mortgagees would not invalidate the lease although it would "cause the statutory power of sale to become immediately "exercisable under section 20, clause (iii), of the same Act."

In the present case the position seems to me to be radically different. The power of leasing is by the earlier part of the clause excluded. Thus far the mortgagees had no power to grant a lease valid against the mortgagee. But the clause then goes on to provide that the lessee shall not be concerned to see whether any such consent has been given. It seems to follow that, although there is no power in the mortgagees to grant a lease, the lessee, having been expressly absolved by the provision in the mortgage deed from seeing that such a consent has been given, is entitled to assume that it has. In my judgment that operates by way of estoppel against the mortgagee, who cannot say later: "It is quite true that you have not to be concerned to see that "any such consent has been given, and we have expressly said "that you have not; nevertheless, as a matter of fact, there was "no consent and therefore we are going to treat the lease as "void." The lessee could say: "As you have represented that I "need not inquire, that is equivalent to saying that I can assume "that everything is in order. I entered into possession in reliance "on that representation, and you cannot be heard to say that "you did not give consent." This is a novel point arising from a form of words which, though to be found in another connexion both in the Conveyancing Act, 1881, and the Law of Property Act, 1925, has not, so far as I know, been previously used as it is here. In my judgment this is a good answer to the mortgagee's claim for possession, for the tenant can say "I am in under a "lease for 21 years which you may not deny was granted with "your consent." That is the ground of my decision; but other points were taken before me, and I think that I had better take some notice of them.

It was said, first, that the demand and receipt of rent by the receiver—indeed, on two occasions—was a recognition by the mortgagee that Mrs. Kreutzer was properly there as a tenant and thus of a new tenancy. The retort to that was that under section 109 of the Law of Property Act, 1925, a receiver is made the agent not of the mortgagee but of the mortgagor, and therefore receipt of money by a receiver is not a recognition by the mortgagee of the tenant's position. There ought to be some clear authority on that subject; but I must say that I have found

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it very hard to discover it. In the books there is a case, *Serjeant v. Nash, Field & Co.*,⁵ which is cited in Carson's Real Property Statutes, 3rd ed., and other textbooks as authority for the proposition that receipts by a receiver are not a recognition of a new tenancy. At p. 703 of Carson it is said: "The payment of rent " to such receiver by the occupying tenant did not under the " circumstances create a tenancy by estoppel as between the " tenant and the mortgagee." For that, this case is cited; but I must say, having looked at the case, that I think that it is a very unsatisfactory authority for that proposition.

The lessee further argued that, although under section 109 (2) the receiver is made the agent of the mortgagor, he does not cease thereby to be the agent of the mortgagee. I would not accept that proposition. The statute makes the mortgagor solely responsible for his receipts, and it seems to me that the purpose of section 109 (2) is to create this position, which used to be created by specific clauses in the mortgage deed; that the receiver shall not be the agent of the mortgagee but shall be treated as the agent of the mortgagor.

In my judgment a receiver under the Act is such an agent, and, although he may use the mortgagee's name for certain purposes, he is not, by virtue of the statute, the mortgagee's agent. Therefore, I take the view that the receipt by a receiver under the Act of rent does not create a tenancy by estoppel as against the mortgagee.

This case contains another complication, in that the appointment of the receiver was made on April 21, 1955, two days after the transfer of the charge to the plaintiff. The plaintiff did not, however, become the registered proprietor of the charge until July; and it is said, therefore, that it could not exercise statutory powers to appoint a receiver until the latter date. For that proposition section 33 (1) and (2) and section 34 (1) of the Land Registration Act, 1925, were relied upon. [His Lordship read these subsections and continued:] I think that justifies the proposition for which it was cited, namely, that, until the transfer is completed by registration, the statutory powers remain in the person whose name is on the register; and therefore until July, when the plaintiff was registered, it was not in a position to exercise statutory powers. That being so, it appointed a receiver not under the Act, but merely like any other person who appoints an agent to do something for him, and the receiver was its agent, and if as its agent he demanded, as he did, and

⁵ [1903] 2 K.B. 304.

collected, as he did, two quarters' rent, that is an unequivocal recognition of the existence of a tenancy. So on that ground, also, I think that the second defendant would be entitled to resist this claim. That would not necessarily mean recognition of the 21 years' lease; it might only set up a yearly tenancy; but it would be enough, anyhow, to answer the claim made in the originating summons.

There was one other point which I think I should mention. It was based on the fact that the date at which the direction was first given to pay rent to the plaintiff was the same on which the act of bankruptcy of the mortgagors was committed, namely, March 23, 1955. My attention was called to section 110 of the Law of Property Act, 1925, which says: "(1) Where the statutory or express power for a mortgagee either to sell or to appoint a receiver is made exercisable by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt, such power shall not be exercised only on account of the act of bankruptcy or adjudication, without the leave of the court." It was said that the proper inference to draw was that the receiver was appointed having regard to the commission of an act of bankruptcy, and as no leave of the court was obtained, as admittedly it was not, the appointment was a bad one.

I have not the evidence to adjudicate upon that matter. It will be observed that the section says that that has to be the only reason for the exercise of the power. I cannot possibly conclude, on any evidence before me, that, even if that was one of the reasons, it was the only reason. Therefore, I should not have been willing to accede to that submission.

Accordingly, I decide this case on the ground that there is a good lease by estoppel as between the mortgagees and the second defendant. I should also have been prepared to dismiss the summons on the other point, namely, that there was a recognition of the second defendant's tenancy which created a new relationship of landlord and tenant between her and the mortgagees which would be enough, the tenancy not having been determined, to answer the claim for possession, which alone is the subject-matter of the action.

The result is that I dismiss the summons.

Order accordingly.

Solicitors: *Tringhams; A. L. Bryden & Williams.*

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Harman J.

C. A.

In re W.— (INFANTS).*In re* GUARDIANSHIP OF INFANTS ACTS, 1886–1925.

1956

Jan. 16.

Lord
Evershed M.R.,
Birkett and
Romer L.JJ.

Court of Appeal—Leave to appeal—Interlocutory matter—Order concerning custody and maintenance of infants—Amount of maintenance varied by justices—Appeal to High Court dismissed—Necessity of obtaining leave to appeal to Court of Appeal—Whether appeal “concerning custody of infants”—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 31 (1).

Infant—Maintenance—Amount—Whether means of mother to be taken into consideration—Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 3 (1) (2). Infant—Custody—Court of Appeal—Leave to appeal—Question of maintenance.

A mother, to whom the custody of the infant children of the marriage had been granted, appealed to the High Court from an order made by justices varying the amount of maintenance payable by the father. Her appeal was dismissed and on the question of the necessity of obtaining leave to appeal to the Court of Appeal:—

Held, that the order appealed from was an interlocutory order; it was not an order in which the custody of infants was concerned within section 31 (1) (i)¹ of the Supreme Court of Judicature Act, 1925, and therefore it was necessary to obtain leave to appeal.

Chinchen v. Chinchen [1950] W.N. 22 (C.A.); *In re Whittle (An Infant)* [1953] 1 W.L.R. 1405; sub nom. *In re W. (An Infant)* [1953] 2 All E.R. 1337 (C.A.) considered.

Held, further, that in assessing the amount of maintenance under section 3 of the Guardianship of Infants Act, 1925,² the court is entitled to take into account the means of the mother, as they are a relevant factor to be considered together with all the other circumstances particularly appertaining to the infant or infants in question.

Per curiam. But where, for instance, the mother is earning, those earnings should not necessarily be taken into account; it might be in the children's interest for her to give up her employment.

¹ Supreme Court of Judicature (Consolidation) Act, 1925, s. 31: “(1) “No appeal shall lie . . .—(i) without “the leave of the judge or of the Court “of Appeal from any interlocutory “order or interlocutory judgment “made or given by a judge, except in “the following cases, namely—(i) “where the liberty of the subject or “the custody of infants is concerned.”

² Guardianship of Infants Act, 1925, s. 3: “(1) The power of the “court under s. 5 of the Guardianship “of Infants Act, 1886, to make an “order as to the custody of an infant “and the right of access thereto may

“be exercised notwithstanding that “the mother of the infant is then “residing with the father of the “infant.

“(2) Where the court under the “said section as so amended makes “an order giving the custody of the “infant to the mother, then, whether “or not the mother is then residing “with the father, the court may “further order that the father shall “pay to the mother towards the main- “tenance of the infant such weekly “or other periodical sum as the court, “having regard to the means of the “father, may think reasonable.”

In re T.— (*Infants*) [1953] Ch. 787; [1953] 2 All E.R. 830 approved.

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MOTION for leave to appeal notwithstanding time expired.

This was an application by a mother for leave to appeal, notwithstanding that the time had expired, from an order of Roxburgh J. dismissing her appeal from the variation by justices of an order made by stipendiary magistrates as to the custody and maintenance of two infants. By the variation the amount payable by way of maintenance in respect of each infant was reduced from 30s. to 22s. 6d. a week.

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On the hearing of the motion the court heard argument on the questions: (a) whether it was necessary to obtain leave to appeal; (b) whether by virtue of the provisions of section 3 (2) of the Guardianship of Infants Act, 1925, a court, in assessing the amount of maintenance, was entitled to take into account the means of the mother.

The facts are fully set out in the judgment of Lord Evershed M.R.

V. B. Watts for the applicant. It is conceded that the order, from which leave to appeal is sought, is an interlocutory order: *Chinchen v. Chinchen*³; *In re Whittle*.⁴ It is plain on the authority of these decisions that the Court of Appeal is competent to hear appeals from a judge of the Chancery Division relating to orders concerning the custody of infants. The original order made by the Cardiff stipendiary magistrates related to custody as well as to maintenance, and the question is whether, the order now in question primarily relating to maintenance, the appeal can nevertheless be considered as one from an order *concerning* custody. It is true that Roxburgh J. only affirmed that part of the order which related to maintenance, since he was only concerned with maintenance; nevertheless the order as a whole concerned custody, and in these circumstances leave to appeal is not required because the order falls within the exception referred to in section 31 (1) (i) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925.

If it be held that leave to appeal is necessary, it should be granted, for it is sought to raise the question of the true intent and meaning of section 3 of the Guardianship of Infants Act, 1925. The justices were not competent, in assessing maintenance, to take into account the means of the mother. *In re T.*—

³ [1950] W.N. 22.

⁴ [1953] 1 W.L.R. 1405; [1953] 2 All E.R. 1337.

C. A. (*Infants*)⁵ was wrongly decided. The plain wording of section 3
 1956 (2) of the Act of 1925 does not admit of the court taking into
 W. ——— consideration the means of the mother; if the legislature had so
 (INFANTS), intended, express language to that effect would have been used.
 In re. J. H. Boraston for the respondent was not called on to argue.

LORD EVERSHED M.R. This motion, which seeks leave to appeal notwithstanding that the time has expired, has raised two questions of some general significance. Let me say at once that, although we have not heard Mr. Boraston, I can see no difficulty in Mr. Watts' way on the mere question of the time of the application. The order which he seeks to appeal from was entered on November 8, 1955; but he, or those for whom he appears, took the proper steps to appeal to this court within due time: the only reason why the matter has not hitherto been considered is because of these other points which I am about to consider. I therefore think that no problem faces Mr. Watts on that limited matter. His first point has been whether any leave to appeal is required at all. The order from which he desires to appeal is an order made by Roxburgh J.—made in fact on October 5, but entered on November 8, 1955—whereby the judge affirmed an order of April 25, 1955, made by the Loughborough magistrates under their powers under the Guardianship of Infants Acts, 1886 to 1925.

I turn back, therefore, to the order made by the magistrates; and in order to make that clear I should refer to still earlier narrative. In or about 1953 the wife appears to have left her husband (who lives, and I assume has lived at all material times, at Loughborough in Leicestershire) and departed with the two small male children of the marriage to her own parents in the City of Cardiff. On January 13, 1955, the magistrates' court at Cardiff (again acting under their jurisdiction under the Guardianship of Infants Acts, 1886–1925) made an order containing two highly important directions or provisions. The first was that they directed that the custody of these children should be with their mother, the present applicant. They then went on to direct, under the powers contained in section 3 of the Act of 1925, that the father should pay 30s. to the mother in respect of each of the two children, £3 a week in all. The father found not long afterwards that the £3 a week (which in truth he had voluntarily consented to pay) was more than he could properly afford; or so he alleged. He therefore brought the matter of

⁵ [1953] Ch. 787; [1953] 2 All E.R. 830.

the amount of maintenance only (not challenging the Cardiff magistrates' direction as to custody) before the Loughborough magistrates on April 25, 1955.

On that occasion the mother did not attend; which is not perhaps to be wondered at: it is a long way from Cardiff to Loughborough and the expense would be considerable. The firm of solicitors who represented her therefore wrote a letter to the clerk to the magistrates explaining why their client was not attending, and raising in the letter certain objections to the father's proposals of which they, as solicitors, were obviously aware. The father did attend; he gave evidence, and he told the magistrates that he found this £3 a week more than he could manage. He gave certain figures; and he mentioned (among other things) the fact that when his wife left he had £50 worth of her debts to pay. That may or may not have been accurate, but the magistrates who heard it thought that it was correct: they believed him as a witness; and (to dispose of one of Mr. Watts' points at once) it seems to me idle to suggest that there was no evidence upon which they could act. They were entitled to listen to the husband's evidence, and, if they thought him (as they plainly did) an honest witness, they were entitled to hold as a matter of fact that £3 a week was, in existing circumstances, too great a burden and that, having regard to his means (I am quoting now the language of section 3) it was more than he reasonably ought to pay. They therefore reduced the 30s. a week to 22s. 6d.; and it was from that order that the wife appealed unsuccessfully to Roxburgh J.

The first question which Mr. Watts has raised is whether he needs any leave to appeal at all. That question depends upon the true construction of section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925. [His Lordship read the relevant part of the section and continued:] Mr. Watts has conceded that this order of Roxburgh J. was an interlocutory order; and, in my judgment, he was plainly right so to concede. The matter has been considered on two occasions by this court: in *Chinchen v. Chinchen*¹ and in *In re Whittle*.² Those cases make it clear, I think, that, even if the matter of custody were directly determined or considered, still an order of the character of any of the three orders I have mentioned is an interlocutory order or judgment. But, says Mr. Watts, although the matter of custody was not debated before the Loughborough magistrates

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¹ [1950] W.N. 22.

² [1953] 1 W.L.R. 1405; [1953]
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(and not, therefore, before Roxburgh J.) still the order was one where the custody of infants was “concerned.” It is, of course, true that the matter of maintenance arose out of the making of the order by the Cardiff magistrates who, under section 3 of the Guardianship of Infants Act, 1925, had given custody to the mother and had therefore, under subsection (2), proceeded to go on to order maintenance from the father. But it is, I think, to give far too wide and vague a signification to those words, “where “the custody of infants is concerned,” to say that the order of Roxburgh J. was within the scope of that phrase. Roxburgh J. was not in any true sense “concerned” with the custody of the infants at all; he was not asked to consider that matter; and the custody was left, by the consent of both parties, with the mother; no question arose before the judge which in any way interfered in this respect with the effect of the original order. I therefore think for myself that beyond a peradventure this is an interlocutory order and, not being one within the sub-paragraph (i), leave is required in order to challenge Roxburgh J.’s order in this court.

That being so, ought we to give leave? I have already said that I do not think (not having, however, heard Mr. Boraston) that any point arises as to the time of this application. But Mr. Watts has said that notwithstanding the judge’s own refusal we should grant leave on two grounds; the first of which is that this case raises an important matter of law as to the meaning of section 3 of the Guardianship of Infants Act, 1925, namely, the competence of the court in such cases to pay any regard to the means of the mother. The second point which Mr. Watts raises is that he wishes to challenge the whole proceeding on the ground that there never was any evidence whatever which justified, or could have justified, the magistrates in reducing the sum from 30s. to 22s. 6d. per child.

I have already sufficiently considered the second point, because I have stated my view that there was evidence, and I do not propose to spend any more time upon it. The other point is, however, of some little significance; and I gather that the view that prevailed in this case has been acted upon in practice for some considerable time. It is therefore right that I should say now, aye or no, whether I think that the view hitherto taken is correct. Let me say at once that I think it is. The point arises because of the precise language of section 3 (2) of the Guardianship of Infants Act, 1925, which is: [His Lordship read the subsection and continued:] In a sentence, the argument for

the mother has been that the express reference to "the means of the father" necessarily excludes reference to the means of anybody else, whether a mother or a cousin or an aunt or any other person. I do not agree with that view. I accept for my part the reasoning of Roxburgh J. himself in the earlier case of *In re T.*—(*Infants*).³ There the conclusion of the matter was put thus by the judge⁴: "the phrase is 'towards the maintenance of the infant,' not 'in satisfaction of' or 'in discharge of,' or anything of that sort. It is 'towards the maintenance.' The first thing that the court has to consider is: What does the infant need? For that purpose, the court has to consider the age of the infant, whether it is at school or in a perambulator or at a university—these are all relevant considerations—whether it has been brought up in a gold-lined cradle or whether it has not. That is not immaterial. I mean, its standard of life hitherto is by no means immaterial. It would surely quite plainly be permissible to consider whether it had funds provided for its maintenance by some deceased grandparent or aunt; and why should it not be considered how far its mother is able to maintain it? I can see no reason for excluding that one circumstance, which seems to me to be very relevant, from all the other relevant circumstances which have to be considered."

Subject to one qualification, which I will state in a moment, I agree with that statement by Roxburgh J. After all, Parliament is enacting that the court may order the father to pay what it thinks is reasonable—that is, what is reasonable in all the circumstances of the case, including the circumstances particularly appertaining to the infants—having regard to what the father has got out of which he can pay. That slight expansion of the parliamentary language makes it clear, I think, that the reasonableness must be judged, among other things, in light of what there is in fact available to the infants, whether (as Roxburgh J. put it) from the benefaction of a deceased parent or an aunt or (as in the present case) from the circumstance that the mother is able here to make provision, via her own parents, for a home for these children.

I now state (though it is perhaps obvious) the qualification. It does not follow that, because it is shown that the mother is earning X pounds a week, that it is a necessarily correct yardstick for determining how much the husband, out of what he

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³ [1953] Ch. 787; [1953] 2 All E.R. 830. ⁴ [1953] Ch. 790, 791.

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earns, has to pay. It might well be, for example, that the court would say: "Well, we do not think it at all a good thing that the mother should be earning anything. The children are very small; they may be delicate; they have no one to look after them: the mother ought to spend all her time with the children and look after them; and the father can well afford it if she does." That no doubt explains why, in considering how much the father ought to pay, Parliament directs particular attention to the father's means. But, for reasons which I have already given, it would be, it seems to me, quite contrary to the whole tenor of the Act to make the father's means the exclusive standard, the exclusive subject-matter to be regarded, in fixing what ought to be paid, without any notice whatever being taken of the particular circumstances of the children.

I agree, as I have said, with the judgment of Roxburgh J. in *In re T.*—(*Infants*).⁵ I gather from what he there said that that view has been acted upon by magistrates' courts up and down the country; and I am glad to think that on this occasion I can also give to their interpretation of the matter the imprimatur of the Court of Appeal.

For those reasons, I think that there is no ground shown why we should grant leave to appeal, which I think the present applicant must obtain if the appeal is to be entered at all.

BIRKETT L.J. I agree. The statement of the facts as they appear in the reasons of the justices attached to our papers seems to me to have a very considerable bearing upon one or two of the matters involved.

The first point arose under the Supreme Court of Judicature (Consolidation) Act of 1925. Section 31 (1) of that Act provides that "without the leave of the judge or of the Court of Appeal from any interlocutory order"—and it was conceded that this was an interlocutory order—" . . . made or given by a judge," there shall be no appeal "except in the following cases, namely, (i) where . . . the custody of infants is concerned." There was no question in this case but that in the true meaning of the word "concerned" the original order made by the Cardiff magistrates, upon which everything else has followed, was in the ordinary sense "concerned" with the custody of the children, because the order of April 25, 1955, itself recited that the applicant was "granted the legal custody of the two children of the marriage" and the sum of 30s. Od. for the maintenance of each of the said

⁵ [1953] Ch. 787.

"children"; so, in strict consideration of English, it would be impossible to say that the order was not "concerned" with the custody of the children. But I am quite satisfied for my own part that the proper construction of that section is that "concerned" there means something equivalent to where the custody of the children is in contest or in issue or is the real matter which is to be determined, and it is only in that event that the words of the subsection become operative.

The other point, which was the important one taken in the case, concerned the construction of section 3 (2) of the Guardianship of Infants Act, 1925. The contention that was put before the court on the part of the applicant was that that subsection really forbade a court considering the particular matter to have regard to the means of the mother as distinct from those of the father. Perhaps I may make that intelligible by putting it in this way. The original order made by the magistrates at Cardiff had been for 30s. a week maintenance for each of the children, and that 30s. had been volunteered by the father. He had said: "The custody is going to the mother, and I will provide 30s. a week for the maintenance of each child"; and the order of the justices was based on that.

Subsection (2) reads: "Where the court . . . makes an order giving the custody of the infant to the mother . . . the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable"; and there the original order stood. Then there came a moment when the father found that that sum was rather beyond his power to pay; he had over-estimated his ability to pay; and he therefore went to the Loughborough justices and asked them to vary the order from 30s. a week for each child to something less. He gave evidence before them about his means. The mother was not there, and so far as we know there was no cross-examination of the father; but he undoubtedly created a very good impression on the justices at Loughborough, and they have sent to the court the reasons why they reduced the amount from 30s. to 22s. 6d. for each child.

In the course of the reasons which they gave, the justices said: "We considered that having regard to the circumstances of the parties, the wife living with her parents and in work and the fact that the original order was made by consent that we should exercise our power of variation and we varied the

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“order to 22s. 6d. per week for each child.” Mr. Watts, for the applicant, said that the magistrates had really no power to do that, that it was really in excess of any power that the Act gave them. They took into account, said he, the means of the wife, and subsection (2) gives them no power to do so. First of all, let me say that I am by no means certain that they took into account the means of the wife, in any true sense of that term at all.

After reciting the facts and stating what was their view of the father as an upright and honest man, the magistrates then said: “As the original order was made by consent upon an offer made by the husband we considered that if we were satisfied that the husband had made an offer which he afterwards realized was too high and with which he was not able to comply, then having regard to the means of the parties we were entitled to reconsider the amount of the order.” Then the reasons go on: “We were satisfied that the husband in offering a total sum of £3 per week had taken on an obligation which he had found himself unable to meet. We were impressed by the husband as a witness and considered that his action throughout had been entirely honest and praiseworthy and that his thoughts for his children had been those of a good father; . . . we were of the opinion that a weekly sum of 22s. 6d. for each child was a just and adequate sum.”

There is no doubt at all that the justices did consider, as the main matter in the case, the £3 which the father originally had volunteered to give as maintenance for the children, and were satisfied that in making that offer he had taken on a burden or obligation which he could not meet; and they said that after listening to the evidence. This passage, “We considered that having regard to the circumstances of the parties, the wife living with her parents and in work and the fact that the original order was made by consent,” may be taken perhaps to mean no more than this: “We have considered the means of the father and we think, having regard to the means of the father, that it is reasonable to make this order of 22s. 6d.”; and that is, of course, what the subsection enjoins—“such . . . periodical sum as the court, having regard to the means of the father, may think reasonable.”

I asked Mr. Watts in the course of the argument what was the point of the word “reasonable” in that subsection. He was contending, as I understood it, that the only matter which the justices could consider was the means of the father and nothing

else. The Master of the Rolls repeatedly put to him various illustrations about money having been left to the children, or a trust made for them, or a kindly aunt providing for them; but the contention appeared to be that the justices are confined to the means of the father.

I am not at all sure that, even if that interpretation were right (which I do not think it is), on the facts of this case the justices did not confine themselves to the means of the father in making their order and then said: "But we know the state of the parties," as though they were intending to say: "The welfare of the children will in no degree suffer."

The case which Mr. Watts brought to our notice, *In re T.*—(*Infants*),⁶ a decision of Roxburgh J. from which my Lord quoted, is a perfect authority for the justices to do as they did, because there Roxburgh J., having this identical point before him—whether the justices can take into account the means of the mother—held that they could; and in a passage which my Lord did not cite Roxburgh J. said⁷: "Most incredible results would follow if the only thing that the court could consider, in exercising its discretion under this subsection, were the means of the father;"—which was, of course, the submission of Mr. Watts; the section does not say "only the means of the father," but the argument was really based upon the supposition that it did—"so incredible that counsel did not suggest that that was the interpretation. He says that it should be read as follows: 'The court may further order that the father shall pay to the mother towards the maintenance of the infant such sum as the court may think reasonable, having regard to all relevant circumstances, including means, but, as to means, having regard to those of the father only.'"⁸ Roxburgh J. went on to say that a different construction had been put upon this section for over 30 years, and he was proposing to say that one could, if need be, take into account, in one's consideration of the case, the means of the wife.

I would concur in the way my Lord framed it. Here the court (in this case Roxburgh J.) had to consider the order which had been made as varied by the Loughborough justices, and the provision of section 3 (2), and when that is read—"such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable"—the justices are entitled to look at the circumstances of the case to see what

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⁶ [1953] Ch. 787.⁷ *Ibid.* 791.

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sum is in fact reasonable in all the circumstances for the father to pay in this case; and if, in the consideration of that matter, they find the children in a particular situation, they are entitled to take those circumstances into account. I cannot think for one moment that either the justices or Roxburgh J. fell into any error about that matter in this case at all. Therefore, for my own part I would say that leave to appeal should not be granted.

ROMER L.J. I agree. For my part I think it is fairly plain that, in exercising the jurisdiction conferred by section 3 (2) of the Guardianship of Infants Act, 1925, the court may treat as a relevant circumstance the means of the mother. One can imagine a case, for example, where the mother has a house of her own and an independent income of her own of perhaps £1,000 a year, while the husband is in some occupation in which he is earning £6 or £7 a week: in circumstances such as those it is plain, I should have thought, that the justices could properly take into account, having regard to the terms in which the subsection is framed, the income and assets of the mother. Nevertheless, I should like myself to re-emphasize what the Master of the Rolls has pointed out in his judgment—that, although the justices can take a mother's means into account, it by no means necessarily follows that they always should do so in all circumstances. My Lord gave an illustration of a case in which it might be right not to take the mother's means into account. For example, as he said, where she is working in order to make some money for herself and for the children, which involves her being absent from the home in which the children are living when they are all of tender age, it would be in their interest that she should be there to look after them, and, in those circumstances, if she gave up her employment she would lose her income, but the children would be better off from the point of view of having her in attendance. There are other examples which might be given as well: but that the court has jurisdiction to take into account as a relevant factor the means of the mother, and, indeed, should normally do so, I have no doubt.

For those reasons, with those which my brethren have given, I agree that the application fails.

Application refused.

Solicitors: *Rhys Roberts & Co. for C. James Hardwicke & Co., Cardiff; Vizard, Oldham, Crowder & Cash for Bartlett, Walters & Parry, Loughborough.*

J. A. G.

In re BOSTON'S WILL TRUSTS.
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[1955 B. No. 4041.]

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Jan. 26, 27,
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Vaisey J.

Trust for Sale—Repairs—Agricultural land—Expenditure on repairs by trustees for sale—Whether proper to apply capital moneys—Whether discretion to apply capital moneys for such repairs without regard to the interests of persons in remainder entitled to capital—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 28—Settled Land Act, 1925 (15 & 16 Geo. 5, c. 18), ss. 73 (1) (iv), 75 (1) (2), 83, 107, Sch. III—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6, c. 63), ss. 1 (2), 81 (1), 96 (1), Sch. III.

Agriculture—Agricultural holding—Trust for sale.

A testator, who died on September 16, 1941, by his will dated January 13, 1941, devised and bequeathed his residuary real and personal estate unto the executors and trustees thereof upon trust for sale and conversion (with the usual power to postpone sale and conversion) and for investment. Included in the residuary estate were certain valuable freehold properties, agricultural property and urban property, which had been retained by the trustees in exercise of the power to postpone sale conferred by the testator's will.

In the period between the death of the testator and the spring of 1951 the trustees had expended a considerable sum of money on repairs to the properties in question.

Subsequent to the decision in *In re Duke of Northumberland, decd.* [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181, the trustees took the advice of counsel on the question whether, in view of that decision, they could properly apply capital moneys of the estate for making payments for repairs which, but for the provisions of the Agricultural Holdings Act, 1948, could only have been chargeable against income. The trustees were advised, and subsequently acted on such advice, that they could apply capital moneys in accordance with *In re Duke of Northumberland, decd.*, supra, and could themselves give the necessary directions for such application, subject only to their obtaining surveyor's certificates under section 84 (2) (i) of the Settled Land Act, 1925.

The trustees, who included a person contingently interested in remainder to the estate, now raised the questions, inter alia, how far they were entitled, as persons having the powers of a tenant for life under the Settled Land Act, 1925, to continue the course which they had hitherto adopted of paying for repairs out of capital, and whether they, as trustees for sale, having regard to the terms of section 75 (2) of the said Act, had a discretion to apply capital moneys for the payment of repairs without regard to the interests of the persons entitled to the capital of the estate in remainder:—

Held, that the trustees, notwithstanding paragraph 23 of Part II of Schedule III to the Agricultural Holdings Act, 1948, had a duty to preserve the capital value of the testator's residuary estate in

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exercising the discretionary powers conferred on them by the joint effect of section 28 of the Law of Property Act, 1925,¹ section 73

¹ Law of Property Act, 1925, s. 28 (1): "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925."

Settled Land Act, 1925, s. 73 (1): "Capital money arising under this Act . . . shall . . . be . . . applied . . . in one . . . of the following modes (namely):— . . . (iv) In payment as for an improvement authorized by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1923, . . . in or about the execution of any improvement comprised in Part I or Part II of the First Schedule to the said Agricultural Holdings Act."

S. 75 (1): "Capital money arising under this Act shall . . . be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly."

Subs. (2): "The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement, and any investment shall be in the names or under the control of the trustees."

S. 83: "Improvements authorized by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the works mentioned in the Third Schedule to this Act, or of any works for any of the purposes mentioned in that Schedule, and any operation incident to or necessary or proper in the execution of

"any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes."

S. 107 (1): "A tenant for life or statutory owner shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

Agricultural Holdings Act, 1948, s. 1 (2): "For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business. . . ."

S. 81 (1): "Where under powers conferred by the Settled Land Act, 1925, . . . capital money is applied in or about the execution of any improvement specified in the Third Schedule to this Act no provision shall be made for requiring the money or any part thereof to be replaced out of income, and accordingly any such improvement shall be deemed to be an improvement authorized by Part I of the Third Schedule to the Settled Land Act, 1925."

S. 94 (1): "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:— . . . 'fixed equipment' includes any building or structure affixed to land and any works on, in, over or under land, and also includes anything grown on land for a purpose other than use after severance from the land, consumption of the thing grown or of produce thereof, or amenity, and any reference to fixed equipment on land shall be construed accordingly. . . ."

S. 96 (1): "References in any enactment, other than an enactment con-

(1) (iv) of the Settled Land Act, 1925, and section 96 (1) of the Agricultural Holdings Act, 1948, and ought not to lay out capital moneys in any manner authorized by the joint effect of those sections without regard to such duty.

In re Duke of Northumberland, decd., *supra*, distinguished.

Per Vaisey J. I hesitate to attempt to define or limit the principles under which the trustees ought to exercise their discretion. I cannot myself see that it would be wrong for trustees to take into consideration such matters as the comparative wealth or poverty of the parties entitled to the income and of the parties interested in the capital of the settled property, or (for example) any benefits which either of them may have conferred on the settled property. I do not think that it should be a matter of mere arithmetic with no reference to the personal elements in the situation, which indeed it may be very difficult for a trustee to disregard, even if he tried to do so.

ADJOURNED SUMMONS.

The following facts are taken substantially from the judgment. By his will dated January 13, 1941, the testator, the Right Honourable George Florance (sixth) Baron Boston, who died on September 16, 1941, appointed his nephew, the second defendant, the Honourable Cecil Eustace Irby, the late Arthur Cary Hampton Borrer, and the plaintiff, Cecil George Inglis, to be the executors and trustees thereof, and devised to them his residuary real and personal estate upon trusts for sale and conversion (with the usual power to postpone sale and conversion) and for investment. He directed his trustees to stand possessed of the resultant investments along with any part of his estate remaining unconverted, and the annual income thereof upon trust during the life of the first defendant, the Right Honourable Greville Northey Irby (seventh) Baron Boston, to hold the income upon protective trusts for his benefit and, subject thereto, to stand possessed of the capital and income of the estate upon further trusts which it is not necessary further to describe except to state that they were trusts for the benefit of persons who might include

"tained in the Agricultural Holdings Act, 1923, or the Agriculture Act, 1947, to the First Schedule to the said Act of 1923, shall be construed as follows, that is to say—(a) references to Part I, II or III thereof shall be construed respectively as references to the Third Schedule to this Act, to Part II of that Schedule and to the Fourth Schedule to this Act. . . ."

Sch. III: "Improvements begun

"on or after March 1, 1948, for which compensation is payable if consent of landlord or approval of the Minister is obtained to their execution. . . . Improvements to which consent of landlord or approval of the Minister required. . . . 23. Repairs to fixed equipment, being equipment reasonably required for the proper farming of the holding, other than repairs which the tenant is under an obligation to carry out."

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the second defendant and other persons unborn or presently unascertainable.

The said will, with a codicil which did not affect the questions to be decided, was proved on December 9, 1941. Mr. Borrer died on February 2, 1953, and thereafter the second defendant and the plaintiff became the surviving executors and trustees of the will. Included in the residuary estate were certain freehold properties in Anglesey which had been retained in exercise of the powers to postpone sale conferred by the testator's will. They comprised agricultural property as well as properties in the town of Holyhead, their total value being about £46,000. The estate, apart from these properties in Anglesey, consisted of investments of about £129,000 in value. The estate was charged with the payment of certain annuities to which it is not necessary to make any further allusion.

The evidence showed that during the period between the death of the testator and the spring of 1951 a considerable sum of money was spent on repairs to the farm and town properties, and in so far as the proportion of the costs of such works was attributable to capital, it was from time to time certified by a surveyor in accordance with the provisions of section 84 (2) (i) of the Settled Land Act, 1925. Subsequently, after the decision in *In re Duke of Northumberland, decd.*,² the trustees took the advice of counsel on the question whether, in view of that decision, they could properly apply capital moneys of the estate for making payments for repairs which, but for the provisions of the Agricultural Holdings Act, 1948, could only have been chargeable against income. They assumed, under the advice of counsel, that section 39 (1) (iii) of the Administration of Estates Act, 1925, gave to the executors (the administration of the testator's estate not having then been completed) and subsequently to the trustees of his will all the powers conferred by section 28 of the Law of Property Act, 1925, that is to say, all the powers of a tenant for life, and all the powers of the trustees of a settlement under the Settled Land Act, 1925. It was the fact of the combination of the two sets of powers in the hands of the same persons which gave rise to the difficulty in the present case. The trustees were advised that they could apply capital moneys in accordance with the decision in the *Northumberland* case,² and could themselves give the necessary direction for such application, subject only to their obtaining certificates under section 84 (2) (i) of the Settled Land Act, 1925.

² [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181.

On or about July 31, 1951, the executors decided to direct that, so far as could properly be done under the *Northumberland* decision,² capital moneys should be applied towards the costs of certain repairs, as distinguished from improvements, and any necessary readjustments made. Accounts were prepared and approved showing the amount expended on repairs since December 31, 1948, which, but for the decision in the *Northumberland* case,² or, rather, the law as interpreted in that case, could only have been charged against income but had, in fact, been charged against capital in reliance on that decision.

The trustees were now desirous of having the question determined by the court how far they were entitled to continue the course which they had hitherto adopted of paying for repairs out of capital.

Accordingly, the plaintiff took out the present summons for determination, *inter alia*, of the questions: (1) whether the plaintiff and the second defendant as executors and trustees of the testator's said will had a discretion pursuant to section 75 (2) of the Settled Land Act, 1925, to direct the application of capital moneys arising under the said Act in payment for repairs such as specified in paragraph 23 of the Third Schedule to the Agricultural Holdings Act, 1948, and notwithstanding that apart from such provisions of that Act such application would not be an authorized application of such capital moneys; (2) if the trustees had such a discretion as aforesaid whether they ought to exercise such discretion without regard to the interests of the persons who ultimately became entitled to the capital of the testator's residuary estate, and, if not, upon what principle they ought to exercise such discretion.

E. Blanshard Stamp for the plaintiff.

E. I. Goulding for the first defendant. (1) If trustees for sale in performing their duties decide that certain work must be carried out on the trust estate, the question at once arises as to how the cost of such work is to be borne. According to the nature of the proposed work there are three possible sources of payment: (a) work which is only properly payable out of income, for example, current repairs to town houses; (b) work which is only properly payable out of capital moneys, for example, the rebuilding of a farmhouse or any building repairs specified under Part I of Schedule III to the Settled Land Act, 1925; (c) work the cost of which trustees have a discretion to pay for either out of capital

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² [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181.

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or income: *In re Sutherland Settlement Trusts*.³ In the result, the cost of the work has been thrown either upon capital or income and the inevitable consequence is that the financial position of the beneficiaries must be altered to some extent. There are five decisions which are relevant on this question: *In re Duke of Northumberland, decd.*⁴; *In re Sutherland Settlement Trusts*⁵; *In re Lord Brougham and Vaux's Settled Estates*⁶; *In re Wynn*⁷; *In re Pelly's Will Trusts*.⁸ On the authority of those decisions question 1 of the summons should be answered as follows: "Declare that [the trustees] as executors and trustees of the testator's will have a discretionary power pursuant to section 75 (2) of the Settled Land Act, 1925, to direct the application of capital moneys arising under the said Act in payment for repairs such as are specified in paragraph 23 of Schedule III to the Agricultural Holdings Act, 1948, so far as such repairs may be regarded as being in the nature of improvements and notwithstanding that apart from the provisions of that Act such application would or might not be an authorized application of such capital moneys."

(2) By virtue of section 28 of the Law of Property Act, 1925, trustees for sale have, in relation to land, all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925. In the exercise of their discretion trustees for sale are entitled to consider all the relevant circumstances in the particular case, including the interests of the trust estate and the financial aspect of all the persons interested. It is suggested that question 2 of the summons should be answered as follows: "Declare that the trustees ought to exercise such discretionary power as they may in each particular case consider proper in all the relevant circumstances including as well the nature of the repairs in regard to their permanence or impermanence importance or unimportance as the maintenance and protection of the interests of the trust estate and the financial effect of any proposed application of capital moneys upon the respective interests of the several persons who are or may become beneficially interested in such estate or the income thereof."

John Mills for the second defendant. (1) It is submitted that *In re Duke of Northumberland, decd.*,⁹ was wrongly decided. The

³ [1953] Ch. 792; [1953] 2 All E.R. 27.

⁴ [1951] Ch. 202.

⁵ [1953] Ch. 792.

⁶ [1954] Ch. 24; [1954] 2 All E.R.

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⁷ [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865.

⁸ Ante 81; [1955] 3 All E.R. 483.

⁹ [1951] Ch. 202.

relevant Schedule—Schedule III—to the Agricultural Holdings Act, 1948, is headed “Improvements,” and section 73 (1) (iv) of the Settled Land Act, 1925, refers to any “improvement” comprised in that Schedule, but paragraph 23 in Part II of Schedule III to the Act of 1948 does not refer to improvements as such but to *repairs*. But not all repairs are improvements, although some may be: *In re Smith*.¹⁰ It is necessary to read the reference to “repairs to fixed equipment” in paragraph 23 of Part II of Schedule III to the Act of 1948 with that qualification in mind. For example, the renewal of screws in the hinges of the front door of a farmhouse are not improvements within the meaning of the Settled Land Act, 1925, which can be paid for out of capital; a casual repair is not an “improvement.” [Reference was made to *Morcom v. Campbell-Johnson*.¹¹] Further, the expression “landlord” in Schedule III to the Act of 1948 does not include a tenant for life. In the law of real property and conveyancing a distinction is drawn between an owner in possession and a person in receipt of the rents and profits of land. To hold that the expression “landlord” includes an owner in possession because that expression is applicable to a person in receipt of rents and profits is a non sequitur.

(2) Trustees in exercising the discretions vested in them must have regard to all relevant circumstances including fiscal considerations. Relevant circumstances are those which have an impact on the trust estate. Thus, the fact that a beneficiary is in straitened circumstances and is therefore unable to indulge expensive tastes is irrelevant. But the fact that the beneficiary is in straitened circumstances and in consequence is liable to allow the estate to fall into disrepair is a very relevant circumstance. Trustees for sale have a complete discretion to pay for the repairs in question either out of capital or income, and if they exercise their discretion in the manner envisaged by *In re Hunt's Settled Estates*¹² they are protected. The trustees have express power to manage and to pay for repairs by virtue of the combined effect of section 28 (1) of the Law of Property Act, 1925, and section 102 of the Settled Land Act, 1925.

It is suggested that questions 1 and 2 of the summons should be answered respectively as follows: “*Declare* (1) that [the “trustees”] as trustees of the said will . . . have (concurrently “with their discretionary power under section 102 (3) of the

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¹⁰ [1930] 1 Ch. 88.¹² [1905] 2 Ch. 418.¹¹ [1956] 1 Q.B. 106; [1955] 3 All E.R. 264.

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" Settled Land Act, 1925), a discretionary power under section 75 (2) of the same Act to apply capital moneys arising under the said Act in payment for repairs such as are specified in paragraph 23 of Schedule III to the Agricultural Holdings Act, 1948, and are in the nature of improvements. (2) That in exercising each or both of the said discretionary powers or partly the one and partly the other the trustees ought to have regard to all relevant circumstances and matters including the nature of the repairs in question, the interests of all persons who are or may become entitled to either income or capital of the testator's residuary estate, the financial and other circumstances connected with or bearing upon the settled property of all such persons as aforesaid who are living and can be identified and the fiscal effects for the purposes of income tax (including surtax) upon all or any such persons."

Stamp on behalf of unborn children. The overriding principle is that it is the duty of trustees to preserve the position as between capital and income, and to lay out capital moneys in such a way as to preserve the capital of the estate and to produce a fair return of income for the tenant for life: see *per* Cotton L.J. in *In re Whiteley*.¹³ Trustees in the circumstances of the present case have precisely that duty: see also Underhill's Law of Trusts and Trustees, 10th ed., p. 331: "It is a mistake to suppose that a trustee is absolutely safeguarded if he invests trust funds in some of the securities authorized by the settlement or by statute." Thus, for trustees to invest in short leases, in order to augment the income of a tenant for life in reduced financial circumstances, would be an improper exercise of their discretion and a breach of trust, and they would have no defence to an action brought by the remaindermen for breach of trust.

The validity of the decision in *In re Duke of Northumberland, decd.*,¹⁴ is not contested. The question is, are the trustees preserving a proper balance as between capital and income? It is suggested that paragraphs 1 and 2 of the summons should be answered as follows: "*Declare* that the trustees in exercising the power conferred upon them by the joint effect of section 28 of the Law of Property Act, 1925, section 73 (1) (iv) of the Settled Land Act, 1925, and section 96 (1) of the Agricultural Holdings Act, 1948, have a duty to preserve the capital value of the testator's residuary estate and ought not to lay out capital moneys in manner authorized by the joint effect of the said sections without regard to that duty."

¹³ (1886) 33 Ch.D. 347, 350.

¹⁴ [1951] Ch. 202.

Goulding in reply. It has been suggested that, at the very least, some limitation should be placed on the ambit of the *Northumberland* decision.¹⁵ The court should not accede to that suggestion because (a) the new statutory powers override the ordinary rules and powers relating to settled properties; (b) the state of the authorities is such that it should be left to an appellate court to effect any limitation.

To encourage agriculture and to induce a tenant for life to keep his agricultural property in good condition the Agricultural Holdings Act, 1948, by section 81, prescribed that a tenant for life could do repairs to such property out of capital and that he was under no obligation to recoup capital out of his income. This new statutory provision cuts across the old-established equitable principle in relation to settled properties. The powers given by the Act of 1948 are not qualified by the ordinary rule relating to trusts of holding a balance as between capital and income. *In re Duke of Northumberland, decd.*,¹⁶ was correctly decided, and all repairs to agricultural property may be paid out of capital whether in the nature of improvements or not. The question was settled beyond peradventure by *In re Lord Brougham and Vaux's Settled Estates*,¹⁷ in which it was held, inter alia, that the painting of existing farm buildings could be paid for out of capital. In *In re Wynn*¹⁸ Harman J. plainly considered that *In re Duke of Northumberland, decd.*,¹⁹ was rightly decided.

Cur. adv. vult.

February 26, 1956. VAISEY J. read the following judgment. [His Lordship stated the facts, as set out above, and continued:] The trustees are now raising the question as to how far they are entitled, as persons having the powers of a tenant for life under the Settled Land Act, 1925, to continue the course which they have hitherto adopted of paying for repairs out of capital, and whether they, as trustees for sale, having regard to the terms of section 75 (2) of the said Act, have a discretion to apply capital moneys for the payment of repairs without regard to the interests of the persons entitled to the capital of the estate in remainder.

It seems to me, putting the matter for the moment in quite broad terms, that the problem may be stated somewhat as follows. Assuming that a tenant for life is empowered under the Act of 1948, upon a principle which has been rightly described by

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¹⁵ [1951] Ch. 202.

¹⁶ *Ibid.*

¹⁷ [1954] Ch. 24.

¹⁸ [1955] 1 W.L.R. 940, 947 et seq.

¹⁹ [1951] Ch. 202.

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Harman J. as "revolutionary" (*In re Sutherland Settlement Trusts*¹ and *In re Wynn*²), to have recourse to capital for expenditure which would normally be a liability of income, are trustees for sale, by virtue of their possession of the powers of a tenant for life, entitled to exercise those powers for the benefit of income and to the detriment of capital under the authority of the *Northumberland* decision,³ or, on the other hand, is the possession of those powers by executors or trustees for sale negated or counterbalanced by their concomitant possession of the power and duty of Settled Land Act trustees to protect capital in a more positive and direct sense than such a power and such a duty is generally vested in a tenant for life?

Now, it seems to me that the *Northumberland* case³ does, at any rate to some extent, relieve the tenant for life as such from the obligation of protecting capital, and certainly it has been so read and construed since it was first reported. But when, as in the present case, the powers of a tenant for life are entrusted to persons who are already subject to the obligation as trustees to hold a fair balance between capital and income, and particularly to consider the claims of capital, it may be difficult to see how such persons can properly make use of the *Northumberland* decision³ for the benefit of income.

Apart from the *Northumberland* decision,³ every tenant for life is, in my judgment, at the same time entitled to consider his own interests and also bound to consider the interests of capital, and to hold the balance fairly between the two, e.g., by not allowing the cost of unimportant and impermanent reparations which in the ordinary course of management would fall upon income to be defrayed out of capital. But this principle appears to me to have been seriously encroached upon by the *Northumberland* decision.³ It may be the fact that the legislature of 1948 was not solicitous to protect capital and deliberately authorized the tenant for life to have recourse to and deplete capital in a manner which has already been described as "revolutionary." But how can the trustees in the present case exercise those special "revolutionary" powers as a matter of discretion without paying the regard, which they are bound to pay in their capacity of trustees, to the interests of capital? That duty rests upon the very firm foundations of equity and fair dealing. Taking the *Northumberland* decision³ in the sense in which it has been

¹ [1953] Ch. 792; [1953] 2 All E.R. 27.

² [1955] 1 W.L.R. 940; [1955] 2 All E.R. 865.

³ [1951] Ch. 202.

understood and acted upon, can it be taken advantage of by quasi-tenants for life who are also trustees, and are not such persons disqualified from benefiting income qua tenants for life by the duties which they owe to the remaindermen qua settlement trustees?

The powers of a tenant for life are fundamentally and essentially fiduciary. Section 107 of the Settled Land Act, 1925, replacing section 53 of the Settled Land Act, 1882, enacts that he "shall, in exercising any power under this Act, have regard " to the interests of all parties entitled under the settlement, and " shall, in relation to the exercise thereof by him, be deemed to " be in the position and to have the duties and liabilities of a " trustee for those parties." In a sense, however, his fiduciary position is in the ordinary case necessarily qualified by reason of he himself being one of the cestuis que trust so that he can legitimately exercise his powers with some, but not, of course, an exclusive, regard for his own personal interests, wishes and tastes. But he is always liable in an ordinary case to be controlled by the settlement trustees who can check him if he is threatening to exercise his powers capriciously or unfairly: see *per* Cotton L.J. in *In re Whiteley*,⁴ and in *In re Hunt's Settled Estates*⁵ and *In re Smith*.⁶ He acts, as it were, under the real if somewhat remote supervision of the settlement trustees whose primary duty is to conserve the settled property for the remaindermen but who are also concerned to secure fair dealing to the tenant for life. See generally Underhill's *Law of Trusts and Trustees*, 10th ed., at pp. 331 and 332.

But when, as in the present case, the fiduciary tenant for life powers and duties and the equally fiduciary trustee powers and duties are vested in the same persons, there must, in my opinion, be a definite limit to the freedom of the exercise of the tenant for life powers by those persons. Under the *Northumberland* decision⁷ as hitherto understood (and I must not be taken to be disapproving in the present case of what I decided in that one) the settlement trustees could not in an ordinary case prevent the tenant for life from benefiting himself by paying for income repairs out of capital subject to their somewhat attenuated powers of stopping him from going too far. I incline to the view that the legislature of 1948 was not concerned to protect capital, and did intend to facilitate the application of capital upon expenditure which would theretofore have been made out of income; that is

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⁴ (1886) 33 Ch.D. 347, 350.

⁶ [1930] Ch. 88.

⁵ [1905] 2 Ch. 418.

⁷ [1951] Ch. 202.

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to say, it was giving a privilege to the tenant for life which he could exercise for his own benefit if he chose. But where that privilege and the duty of controlling it are vested in the same persons, the position is surely different. In other words, the trustees as acting tenant for life are gravely hampered and embarrassed by their paramount duty as acting settlement trustees of protecting the capital. The *Northumberland* decision⁷ merely permits but does not oblige the tenant for life to direct income repairs to be met out of capital; the permission is one to be exercised, if at all, by a tenant for life who is entitled, under the *Northumberland* decision,⁷ to think of himself first. The Act of 1948 has, on the basis of the *Northumberland* decision,⁷ encroached in cases to which it applies upon the fiduciary position of the tenant for life. That position seems to me to remain intact in such a case as the present. My conclusions in the present case follow those of Harman J. in *In re Wynn*.⁸

The second question on the summons asks me to define the principles under which their discretion ought to be exercised by the trustees. I hesitate to attempt to define or limit those principles. I cannot myself see that it would be wrong for trustees to take into consideration such matters as the comparative wealth or poverty of the parties entitled to the income and of the parties interested in the capital of the settled property, or (for example) any benefits which either of them may have conferred on the settled property. I do not think that it should be a matter of mere arithmetic with no reference to the personal elements in the situation which, indeed, it may be very difficult for a trustee to disregard, even if he tried to do so.

I do not propose to attempt to differentiate between repairs and improvements, as was done in *Morcom v. Campbell-Johnson*,⁹ or to define to what extent (if any) trustees situated, as in the present case, can properly take advantage of the *Northumberland* decision.¹⁰ I prefer to answer the first and second questions in the summons together by declaring in general terms that the trustees of the testator's will, notwithstanding paragraph 23 of the Third Schedule of the Agricultural Holdings Act, 1948, have a duty to preserve the capital value of the testator's residuary estate in exercising the discretionary powers conferred on them by the joint effect of section 28 of the Law of Property Act, 1925,

⁷ [1951] Ch. 202.

⁸ [1955] 1 W.L.R. 940.

⁹ [1955] 3 W.L.R. 497; [1955] 3 All E.R. 264 (C.A.).

¹⁰ [1951] Ch. 202.

section 73 (1) (iv) of the Settled Land Act, 1925, and section 96 (1) of the Agricultural Holdings Act, 1948, and ought not to lay out capital moneys in any manner authorized by the joint effect of those sections without regard to such duty.

Declaration accordingly.

Solicitors: *Boodle, Hatfield & Co.*

J. A. G.

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Revenue—Income tax—Schedule C—War damage—Value payments—Interest on payments—Whether chargeable to tax under Schedule C or Schedule D—Whether interest “Interest . . . payable out of “any public revenue by any public office or department of the “Crown . . .”—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. C and fourth r. 1; Sch. D, r. 1 (b)—Finance Act, 1939 (2 & 3 Geo. 6, c. 41), s. 14 (8)—War Damage Act, 1943 (6 & 7 Geo. 6, c. 21), s. 3.

War Damage—War Damage Commission—Nature—Whether commission a body different from the aggregate of its members—Whether commission a “public office” within Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. C, fourth r. 1.

Under the War Damage Act, 1943,¹ the company, which was an “investment company” within section 20 of the Finance Act,

¹ Income Tax Act, 1918, Sch. C: “Tax under Schedule C shall be “charged in respect of all profits “arising from interest, annuities, “dividends, and shares of annuities “payable out of any public revenue, “for every 20s. of the annual amount “thereof.”

Fourth r. 1 to Sch. C: “Interest, “annuities, dividends, and shares of “annuities payable out of any public “revenue by any public office or “department of the Crown shall be “charged under this Schedule by the “commissioners for offices in the said “public office or department.”

Schedule D, para. 1: “Tax under “this Schedule shall be charged in “respect of— . . . (b) All interest of “money . . . not charged under Sch. “A, B, C or E, and not specially “exempted from tax . . .”

Finance Act, 1939, s. 14: “(8) In “this section the expression ‘estate “or trading income’ means income “chargeable to income tax under “Schedule A or Schedule B, income “arising in respect of the ownership “or occupation of land which is “chargeable to income tax under “Schedule D, and income which is “not investment income within the

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1936, was awarded value payments by the War Damage Commission in respect of its proprietary interest in properties which had sustained war damage. It received also accumulated interest on those payments. On the footing that that interest was to be included in such part of the company's income as was not "estate" or "trading income" within section 14 (8) of the Finance Act, 1939, apportionments were made on the company under section 21 of the Finance Act, 1922, and section 14 (1) of the Finance Act, 1939, for the years 1947-1948 and 1948-1949: and, as a consequence of those apportionments, assessments to surtax for those years were made, under the same provisions, against B. W. and E. W., who were members of the company. The company contended that it had received the value payments and the interest thereon under sections 10 and 12 of the War Damage Act in respect of its "proprietary interest" in the properties in question, that the interest represented income arising "in respect of" the ownership of land and was accordingly "estate or trading income" within section 14 (8) of the Finance Act, 1939:—

Held, (1) that the War Damage Commission was a quasi-corporation which had to make the appropriate payments on the true construction of the War Damage Act, 1943, and was a "public office" within the fourth r. 1 of Schedule C; (2) that the interest was accordingly "interest . . . payable out of any public revenue by "any public office" within that rule and fell to be charged under Schedule C by "the commissioners for offices in the said public office or department"; (3) that the word "charged" in the opening words of Schedule C must mean "chargeable" and that therefore the word "charged" in the phrase "charged under "Schedule . . . C" in Schedule D, para. 1 (b), must also mean "chargeable"; so that it was immaterial that there was no evidence that the machinery of Schedule C had been complied with by the appointment of "commissioners for office" under the fourth r. 1; and (4) that in the result the interest was chargeable under Schedule C, and was not "estate or trading income" within section 14 (8) of the Act of 1939.

"meaning of section 20 of the Finance Act, 1936. For the purposes of this subsection the expression 'land' means lands, tenements, hereditaments and heritages, and the expression 'income arising in respect of the ownership or 'occupation of land,' in relation to any building or part of a building, includes profits from the letting thereof furnished."

War Damage Act, 1943, s. 3:
 (1) For the purposes of this Act there shall be constituted a Commission, to be called the War Damage Commission (hereinafter

"referred to as 'the Commission'), consisting of persons appointed by the Treasury in accordance with the First Schedule to this Act, which shall be charged with the duty of executing the provisions of Part I of this Act relating to the making of payments in respect of war damage to land, and shall exercise such other functions as are conferred upon them by this Act. . . .
 (3) The provisions of the First Schedule to this Act shall have effect with respect to the constitution and procedure of the Commission. . . ."

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On May 11, 1954, Bew Estates Ltd. (hereinafter called "the company") appealed to the Commissioners for the Special Purposes of the Income Tax Acts against apportionments under section 21 of the Finance Act, 1922, and section 14 (1) of the Finance Act, 1939, with regard to such part of the company's actual income as was not "estate or trading income" for the years 1947-1948 and 1948-1949. On the same day were heard appeals by Brian Westbury and Eric Westbury, who were members of the company, against assessments to surtax for those years made on them in consequence of those apportionments. On the company's appeal the question for determination was whether interest on value payments paid under section 12 of the War Damage Act, 1943, to the company was "income arising in respect of the ownership or occupation of land" within section 14 (8) of the Finance Act, 1939. The company, a property-owning company whose main assets were freeholds, was an investment company as defined in section 20 of the Finance Act, 1936, and so subject to automatic direction under section 14 of the Finance Act, 1939. Certain of its properties sustained war damage, as a consequence of which it was awarded, under Part I of the War Damage Act, 1943, value payments in respect of its proprietary interest therein, which were satisfied by several payments made to the company in the course of each of the years of assessment 1947-1948 and 1948-1949. The company received also accumulated interest on those payments as provided for by section 10 (5) of the War Damage Act, 1943, of which £2,010 was received in 1947-1948 and £13,343 in 1948-1949. Under section 14 of the Finance Act, 1939, directions and apportionments were made on the company on the footing that the interest in question was to be included in such part of the company's actual income as was not "estate or trading income."

Under section 21 of the Finance Act, 1922, assessments to surtax were made on Brian and Eric Westbury consequent on the apportionment to each of them of part of the company's actual income for each of the years in question, namely, an assessment on each for the year 1947-1948 in the sum of £767 and for the year 1948-1949 in the sum of £5,474.

For the company it was contended that the value payments and the interest thereon were received by the company under sections 10 and 12 of the War Damage Act, 1943, in respect

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of its "proprietary interest" in the hereditaments affected by war damage; that the interest represented income arising "in respect of" the ownership of land and accordingly was "estate or trading income" within section 14 (8) of the Finance Act, 1939, and that the apportionments should be discharged. The last contention was made likewise on behalf of Brian and Eric Westbury, for whom it was further contended that the consequential surtax assessments made on them should also be discharged.

For the Crown it was contended (a) that, save for income being profits from the letting of a building or part thereof furnished, the phrase "income arising in respect of the ownership or occupation of land which is chargeable to income tax under Schedule D" covered only income arising from a source the charge on which had been transferred from Schedule A or B to Schedule D and that, as the interest in question did not represent income arising from any such source, it was not "estate or trading income" within the meaning of section 14 (8) of the Finance Act, 1939; (b) further, or alternatively, that section 12 (2) of the War Damage Act, 1943, merely identified the person who was to get the value payment and the interest on it and that the payment and interest (without distinguishing between them) were paid in respect, not of the ownership of land, but of the statutory right to compensation given to the owner; (c) that, even assuming that the value payment, as distinct from the interest, was paid in respect of the ownership of land, the interest was paid in respect not of that, but of the delay in making the value payment; and that the apportionments and the consequential assessments to surtax on Brian and Eric Westbury should be confirmed.

The commissioners held that, although the interest on the value payments was payable by virtue of the War Damage Act, 1943, it was nevertheless paid in respect of the company's proprietary interest in the properties which had suffered war damage; that, in those circumstances, the interest arose in respect of the ownership of land and was therefore estate or trading income of the company for the years in question and that the appeal succeeded in principle. They left the figures to be agreed by the parties, which was subsequently done: and on July 8, 1954, they determined the appeal by discharging both apportionments and therefore discharging also the consequential assessments to surtax made on Brian and Eric Westbury.

The Crown appealed, and, by notice dated June 27, 1955, informed the company's solicitors that it would contend that the interest was chargeable to tax not under Schedule D but under Schedule C.

Sir Frank Soskice Q.C. and *Sir Reginald Hills* for the Crown. The cases all raise the same point, namely, whether, in section 14 (8) of the Finance Act, 1939, the words "income arising in respect of the ownership or occupation of land which is chargeable to income tax under Schedule D" include the interest on value payments made under the War Damage Act, 1943, so that that interest is included in "estate or trading income" within the meaning of the subsection. The commissioners held that it was, and the Crown now contends that the interest was chargeable to tax under Schedule C and not under Schedule D. This argument is, of course, new, but the court is asked to give leave for it to be put forward. If it could not be put forward without further facts being adduced the court might refuse to allow it: see the judgment of Atkin L.J. in *Attorney-General v. Avelino, Aramayo & Co.*² It is purely a matter of the court's discretion. It is not proposed to adduce new facts but simply to raise a new argument, and that the Crown is entitled to do: *Annual Practice*, 1956, pp. 1249-1250; *Banbury v. Bank of Montreal*.³

[ROXBURGH J. I will allow the point to be taken provided that no new facts are adduced.]

Interest on value payments is "interest . . . payable out of . . . public revenue" within Schedule C to the Income Tax Act, 1918. Of the rules to the Schedule, the one here applicable is the fourth r. 1, which provides that "interest payable out of any public revenue by any public office or department of the Crown shall be charged under this Schedule by the commissioners for offices in the said public office or department." The first r. 1 provides, by paragraph (a), that tax under the Schedule shall extend to all profits arising from (inter alia) interest payable out of any public revenue and, by paragraph (b), that it shall be charged by the commissioners designated for that purpose by the Act. In view of paragraph (b), the Crown's contention that the interest is chargeable to tax under Schedule C could not, if correct, be affected by the circumstance that the charging commissioners had not been constituted, and therefore the court need not know whether there has been any purported designation of

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² [1925] 1 K.B. 86, 109; 40 T.L.R. 785, 788.

³ [1918] A.C. 626; 34 T.L.R. 518.

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charging commissioners. The Crown contends that the War Damage Commission is a "public office" within the fourth r. 1. True, it consists of its members and could not exist apart from them; but it is still the War Damage Commission and, as it has members, has some existence as a body. It would appear to follow that it is a public office, for the interest on value payments is by definition payable out of any public revenue by any public office or department of the Crown, and it is the War Damage Commission which pays it. Further, the Treasury can, pursuant to paragraph 7 of Schedule I to the War Damage Act, 1943, appoint a secretary to the commission, which itself can appoint deputy commissioners and other officers and servants, as the Treasury may determine, whose remuneration is to be paid, as is that of the members of the commission, also as the Treasury shall determine: see paragraph 8. Accordingly, the court is asked to hold that the interest is chargeable to tax under Schedule C and is not "estate or trading income" within section 14 (8) of the Finance Act, 1939.

S. M. Young and R. B. S. Instone for the company and the individual taxpayers. Certainly interest on value payments is included in Schedule C, fourth r. 1 (a), under "interest . . . payable out of any public revenue by any public office . . .," but the commission is not a "public office." It is simply all its members together and cannot exist apart from them. It is not a separate body on its own. Further, even if the court takes the view that the commission is a "public office," the "commissioners for offices in the said public office" by whom the interest is to be charged to tax have not been "designated," or, at any rate, there is no evidence that they have. Thus, the interest has not in fact been charged to tax under Schedule C and falls to be so charged under Schedule D, paragraph 1 (b), as being "... interest of money . . . not charged under Schedule A, "B, C or E and not specially exempted from tax . . ."

ROXBURGH J. The question which is common to these three appeals is whether the interest on value payments under the War Damage Act, 1943, falls within section 14 (8) of the Finance Act, 1939, as "income arising in respect of the ownership or "occupation of land which is chargeable to income tax under "Schedule D."

Everybody seems to have assumed before the special commissioners that the interest was chargeable to tax under Schedule D; but by a notice dated June 27, 1955, the Crown

gave notice to the solicitors for Bew Estates Ltd., the respondent taxpayer company in the first case, that they intended to contend before me that it was chargeable not under Schedule D but under Schedule C. If it is so chargeable, evidently it cannot come within the description of income which I have cited from section 14 (8) of the Act of 1939. After full argument and considerable investigation I allowed the point to be taken, provided that no additional evidence was required. In my judgment it succeeds.

Schedule C of the Income Tax Act, 1918, provided: "Tax under Schedule C shall be charged in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue, for every twenty shillings of the annual amount thereof." That is the whole of Schedule C. I distinguish the rules applicable thereto. As it is conceded that this interest was "payable out of any public revenue," it would at first sight appear to be obviously chargeable under Schedule C; but, owing to the complexity of the drafting of income tax legislation, what seems obvious at first sight quickly recedes into obscurity. I am not going to consider whether it would be possible for a rule applicable to a Schedule to override the Schedule itself, because in my view that question does not arise.

Rule 1 provided: "Tax under this Schedule—(a) shall extend to all profits arising from interest, public annuities, dividends and shares of annuities payable in the United Kingdom out of any public revenue in the United Kingdom or elsewhere, in any year of assessment; and (b) shall be charged by the commissioners designated for that purpose by this Act; . . ." It is admitted that the interest falls within the description, but it is said (and I think truly) that, if no commissioners could be designated for that purpose by this Act, it is difficult to see how tax could be charged under Schedule C in spite of the plain language of the Schedule. It is extraordinary that, after all these years, this sort of situation should exist in an Act of Parliament.

It is certainly extremely difficult to find the commissioners designated for this purpose. It is not made easier here by the fact that several of the rules applicable to Schedule C had the same numbers. After r. 2 and r. 3 came the sub-heading: "Rules as to interest, etc., payable out of public revenue to or through the Bank of England or the Bank of Ireland, or by the National Debt Commissioners." Then came another set of rules numbered 1 to 10. Then after the sub-heading "Rules

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“ as to interest, etc., with the payment of which persons other than the Bank of England, the Bank of Ireland and the National Debt Commissioners are intrusted ” came another set of rules numbered 1 to 9 and, following them, the sub-heading “ Rules as to interest, etc., payable out of public revenue by any public department ” under which r. 1, i.e., the fourth r. 1 to Schedule C, is the material rule here. It provided: “ Interest, annuities, dividends, and shares of annuities payable out of any public revenue by any public office or department of the Crown shall be charged under this Schedule by the commissioners for offices in the said public office or department.” It is common ground that no other rule could possibly apply.

To exclude Schedule C—I am not considering on whom the burden of proof lies, and I do not think it matters—it would have to appear that no such commissioners could have been designated under the Act, because section 14 (8) used the word “ chargeable,” not “ charged.” If the statute provides that the interest in question is to be charged under Schedule C and indicates how the charging commissioners are to be determined, it could be no answer to say that the commissioners had not in fact been constituted. That is important because of the artificial atmosphere in which this case has necessarily proceeded. As this point was never taken before the special commissioners, and, accordingly, they did not find any of the facts relevant to it, and as I allowed the point to be taken only on the footing that no supplementary evidence would be allowed, the court does not know whether anybody purported to designate any such commissioners or not. But counsel for the Crown has satisfied me that the court need not know that for the reason stated. In the last of this series of rules I should expect to find a provision which swept up all cases of distribution of public revenue which had not been dealt with by the preceding series of rules. It would be strange if it did not sweep in everybody who paid away public revenue, because that is the scope of the Schedule and one would naturally expect the rules to fit that scope. Therefore, I approach this question expecting that any body of persons authorized by Parliament to dispense public revenue would be a public office for the purpose of this rule.

That, however, is only a *prima facie* approach. In the last resort the matter must depend on an investigation of the nature of the alleged public office. Again, there is no evidence as to its nature for the reason already given; but, in my judgment, no such evidence would be relevant because the alleged public

office is constituted by an Act of Parliament, and its nature must be determined by the true view of that Act and not by reference to any practice which it may have adopted. The practice could not vary the true construction of the Act of Parliament.

I therefore turn to the War Damage Act to see what the War Damage Commission is. I shall not consider whether it is a "department of the Crown"—I should need more instruction before expressing any opinion on what that is—but I do not think that there is any difference between a public office and a public department. It is the words "of the Crown" that introduce certain complications. I shall base my decision, not on some other statute (I was referred to one), but on what I believe is the right approach to the War Damage Act, 1943. Parliament has recently shown an increasing fondness for creating quasi-corporations, i.e., bodies different from the aggregate of the members, e.g., a members' club, and yet not corporations in the language of jurisprudence. In my judgment the War Damage Commission is just such a quasi-corporation, though counsel have argued with much enthusiasm that it is nothing but the aggregate of its members.

The War Damage Act, 1943, provides by section 1 (1): "There shall be made, subject to and in accordance with the provisions of Part I of this Act,—(a) payments by the War Damage Commission out of moneys provided by Parliament in respect of war damage to land occurring during the risk period . . ." Section 3 provides: "(1) For the purposes of this Act there shall be constituted a Commission, to be called the War Damage Commission (hereinafter referred to as 'the Commission'), consisting of persons appointed by the Treasury in accordance with the First Schedule to this Act, which shall be charged with the duty of executing the provisions of Part I of this Act relating to the making of payments in respect of war damage to land, and shall exercise such other functions as are conferred upon them by this Act. . . . (3) The provisions of the First Schedule to this Act shall have effect with respect to the constitution and procedure of the Commission."

Schedule I, para. 6, provides: "Subject to the preceding provisions of this Schedule, the Commission shall have power to regulate their own procedure, including the manner in which, and the officers of the Commission by whom, questions subject to determination by the Commission under this Act are to be determined and the manner in which determinations made by officers acting in any locality are to be subject to review by a

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“deputy commissioner or other superior officer or by members of the Commission.” Paragraph 7 provides: “The Treasury may appoint a secretary to the Commission, and the Commission may appoint such deputy commissioners and other officers, and such servants, as the Treasury may determine.” I stress that. It seems to me to differentiate the Commission from the mere aggregate of members who could appoint any officers or servants they liked. Paragraph 8 provides: “There shall be paid out of moneys provided by Parliament to the members, officers and servants of the Commission such remuneration . . . and such allowances, as the Treasury may determine.” I stress that, too, as Parliament does not usually pay to provide servants for an aggregate of individuals. In my judgment the War Damage Commission is something different from the aggregate of its members. It is a quasi-corporation, which has to make the appropriate payments on the true construction of the War Damage Act, 1943, and I should have thought that without any possible doubt it is a “public office.”

Accordingly, this was “interest . . . payable out of any public revenue by any public office,” and fell to be charged under Schedule C by “the commissioners for offices in the said public office or department.” Fortunately I do not have to determine what is meant by “the commissioners for offices,” because, if the Act provides for the proper appointment of an assessing commissioner, it can be no answer to say that that direction had not been carried out. I do not know whether it has or has not been carried out. That cannot affect the question whether the interest is “chargeable” under Schedule C; “chargeable” is the word used in section 14 (8) of the Finance Act, 1939.

It was argued that if the tax was not in fact charged, i.e., if the machinery of assessment or charge was not carried through, the interest would be chargeable under Schedule D and that, as there was no evidence that the machinery had been complied with under Schedule C, I must hold that it could and should be charged under Schedule D. In my judgment that argument is fallacious. Section 14 (8) of the Finance Act, 1939, uses the word “chargeable,” but the Income Tax Act, 1918, Sched. C, said “charged.” The same comment applies to Schedule D, which began in this way: “Tax under this Schedule shall be charged in respect of— . . . (b) All interest of money . . . not charged under Schedule A, B, C or E, and not specially exempted from tax . . .” The word used is “charged,” not “chargeable.” It has been argued that, as there is no evidence

that this interest has in fact been charged under Schedule C, it ought to be, or could be, at any rate, charged under Schedule D, para. 1 (b). In my judgment that is an impossible interpretation of the word "charged" in Schedule D. When paragraph 1 (b) uses the word "charged," it is referring to Schedule C—not to the rules under Schedule C but to Schedule C itself. Indeed, that is what the sub-paragraph says—"not charged under "Schedule . . . C." It does not say "not charged under the rules "relating to Schedule C." In the opening words of Schedule C the word "charged" must mean "chargeable," and therefore in the phrase "charged under Schedule . . . C" in paragraph 1 (b) of Schedule D the word "charged" must mean "chargeable."

The contrary view would result in the incidence of tax varying with the efficiency of administration, and it would hardly be fair to Parliament to construe its language on that basis. Therefore, in my judgment, these appeals succeed on the point not taken before the special commissioners. I do not propose to decide whether they would have succeeded on any of the other points, which are more difficult.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Sweepstone, Walsh & Son.*

K. R. A. H.

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[1954 R. 2547.]

Charity—Cy-près doctrine—Residuary gift—Whole of residue given for specific charitable purpose—Seating for church—Fund more than sufficient—Surplus applicable cy-près.

R. by her will bequeathed the whole of her residuary estate "for the continuation of the seating" in a parish church. After complying with the testatrix's bequest so far as practicable there remained a substantial surplus.

On the question whether the surplus ought to be applied cy-près or devolved as on a partial intestacy:—

Held, that, it being a gift of residue, of which the testatrix had manifested an intention to part with the whole subject-matter for a defined charitable purpose, any surplus over and above what

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was required for that particular purpose must be applied *cy-près*, although there was not indicated any general charitable intention in the wider sense.

In re King [1923] 1 Ch. 243 and *In re Royce* [1940] Ch. 514; 56 T.L.R. 540; [1940] 2 All E.R. 291 followed.

ADJOURNED SUMMONS.

The testatrix, Sarah Raine, who died on January 28, 1953, by her will dated June 7, 1944, devised and bequeathed all her property whatsoever whether real or personal to her trustees upon trust to realize such parts of her estate as should not be thereafter specifically devised and to hold the residue (after payment of debts, funeral and testamentary expenses) upon trust to pay the income of any investment therefrom to her brother John Raine and to allow him to have the use of all other articles during his life. Upon the death of her said brother the testatrix (by clause 4) made certain specific and pecuniary bequests, and clause 5 was in the following terms:—

“I bequeath the sum of four hundred pounds for a stained glass window to be inserted in Romaldkirk church in memory of my brother John Raine and myself.”

By clause 6: “I direct that the remainder of my property and effects . . . shall be sold and the proceeds be taken for the continuation of the seating of the church at Romaldkirk.” The testatrix’s brother John Raine died in her lifetime.

Romaldkirk is a village in Teesdale, and the church is one of great interest and beauty. At the date of the testatrix’s death the seating (then fairly recently installed) consisted of oak pews of good design and workmanship and about fifty chairs. After payment of the testatrix’s debts, funeral and testamentary expenses and satisfaction of the specific bequests and payment of the pecuniary legacies other than the legacy of £400 bequeathed by clause 5, and retaining £400 to answer that legacy, the net residue of the estate amounted to about £2,550. Estimates were obtained for the provision of seating in the church, and eventually, after the requisite faculty had been obtained, the necessary work was done at a cost of £411, resulting in the total seating accommodation being increased to 190. The evidence showed that the total population of the village of Romaldkirk together with adjacent farms was about 200; and the seating accommodation which was now available far exceeded the normal requirements of the average congregation and was ample to meet any special occasion. No further seating could in fact be installed without encroaching on the aisles and

detracting from the beauty and dignity of the church. In the circumstances it was apprehended that the testatrix's express direction in clause 6 of her will had been complied with to the utmost extent which was practicable and would have been in accordance with her wishes.

After payment of the said sum of £411 and retention of £400 to answer the bequest in clause 5 of the will the ultimate balance (after allowing for further testamentary expenses) amounted to about £2,000. The question, therefore, arose whether the surplus was applicable *cy-près* or was undisposed of by the will. Accordingly, the plaintiff, the surviving executor and trustee of the will, issued the present summons for determination, *inter alia*, of the question: whether the residuary estate of the testatrix remaining after expending thereout the sum of £411 in the continuation of the seating of the church at Romalldkirk, and any costs incurred in connexion with such expenditure, ought to be applied *cy-près*, or devolved as on the partial intestacy of the testatrix. It appeared that £400 was insufficient to provide an adequate stained glass window in the church.

Hubert Rose for the plaintiff.

J. A. Brightman for the second defendant, one of the next-of-kin. The next-of-kin are entitled to the residue. Where there is a gift of money for a *specified* charitable purpose and that purpose does not exhaust the fund the question whether the surplus ought to devolve on the next-of-kin or be applied *cy-près* depends on whether or not the will manifests a general charitable intent. The above proposition is incontrovertible, and there is no reported case to the contrary. If no general charitable intent can be found, then the surplus must devolve on the next-of-kin: see *In re Connolly*¹; *In re Stanford*²; *In re Royce*.³

*In re King*⁴ would appear to be contrary to the above authorities, and it might be suggested on the basis of the quotation from Tyssen on Charitable Bequests, 2nd ed., p. 202, to be found in the judgment of Romer J. in that case, that any surplus may be applied *cy-près* even though there exists no general charitable intent. But a perusal of the relevant passage in Tyssen does not support that suggestion, for it should be noted that it falls under the heading "3. SURPLUS. 3. *Where there is a general intention to devote the whole subject of the gift to charity . . .*"

¹ (1914) 110 L.T. 688.

² [1924] 1 Ch. 73; 40 T.L.R. 3.

³ [1940] 1 Ch. 514; 56 T.L.R.

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⁴ [1923] 1 Ch. 243, 246.

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In re Robertson ⁵ Bennett J. followed *In re King*, ⁶ but it is submitted that it could only be followed on the basis that there was to be found in the will under consideration in *In re King* ⁷ a general charitable intent. Further, *In re King* ⁷ is contrary to *In re Royce*. ⁸ It is plain on the reported decisions that there must be found a general charitable intent before any surplus may be applied cy-près. There is no general charitable intent shown by this will, for the following reasons: (a) There are only two charitable bequests in the will. (b) Romaldkirk Church benefits by two separate gifts. Where there are two independent gifts for particular specified purposes for a particular charity the inference to be drawn is that the testator had no general charitable intent. (c) There is no gift to trustees for a charitable purpose, but a direct gift for the specified charitable purpose.

N. C. H. Browne-Wilkinson for the Attorney-General. There are two questions for determination: (1) is it necessary to find a general charitable intent before applying a surplus fund cy-près? (2) is there to be found in this will a general charitable intent?

(1) *In re Peel's Release* ⁹ is contrary to the general proposition relied on by the next-of-kin and shows that it is not a universal rule, although it is conceded that it is the normal rule. See the exception referred to in Tudor on Charities, 5th ed., p. 141, where it is said: "Only gifts with a general intent of charity can be applied cy-près. There is an exception to this rule concerning property given absolutely and perpetually to charity, and which has vested in the charity: in such circumstances a rule of convenience has grown up that on the subsequent failure of the trusts the fund can be applied cy-près irrespective of the donor's intention," and *In re Peel's Release* ⁹ is cited as an example; see also p. 157 of Tudor.

On its facts the present case is practically indistinguishable from *In re King* ¹⁰; the testatrix has absolutely parted with the money and that is the distinction between the present case and *In re Stanford*. ¹¹ *In re Buck* ¹² is an example of a case where the court did not seek to find a general charitable intent. It is submitted that it is not necessary to find a general charitable intent before applying a surplus cy-près. Reliance is placed on *In re King*, ¹³ where that question was argued and decided. None

⁵ [1930] 2 Ch. 71.

⁶ [1923] 1 Ch. 243.

⁷ [1923] 1 Ch. 243.

⁸ [1940] 1 Ch. 514.

⁹ [1921] 2 Ch. 218.

¹⁰ [1923] 1 Ch. 243.

¹¹ [1924] 1 Ch. 73.

¹² [1896] 2 Ch. 727, 735.

¹³ [1923] 1 Ch. 243.

of the other cases which have been cited deal with this specific point for they appear to assume that it is necessary to find a general charitable intent; see, for example, *per* Simonds J. in *In re Royce*.¹⁴

(2) In any event, this will shows a general charitable intent in that the testatrix showed an intention to benefit Romaldkirk Church.

[Reference was also made to Tyssen on Charitable Bequests, 2nd ed., p. 184.]

VAISEY J. stated the facts and continued: Not unnaturally, the Rector of Romaldkirk and the churchwardens and Parochial Church Council would very much like to have this £2,000, and they suggest that part of it should be put towards augmenting the sum bequeathed for the window, and the bulk of it should be used for the future maintenance of the seating and of the church itself. If what is called the *cy-près* doctrine, which is very well understood, although its implications are not always very easy to discover, applies in this case, money will have to be devoted to charity. If that doctrine is not applicable, then the surplus money, the £2,000, or whatever the amount may be, goes as on an intestacy to a class of next-of-kin represented by the second defendant.

It has been put forward as a general proposition that, unless one can find a general charitable intent, the *cy-près* doctrine cannot be applied, or ought not to be applied. As a general proposition, I think that is well founded and well established. It is well exemplified by such cases as *In re Connolly*,¹ and *In re Stanford*.² It is to be observed that in both those cases the charitable gift was in the form of a pecuniary legacy, and there was in each case a residuary gift, and the surplus was claimed by those who were interested under such residuary gift. Somewhat different considerations arise where the charitable gift itself is residuary. In Tyssen on Charitable Bequests, 2nd ed., at p. 184, the author gives as one of the occasions in which the doctrine of *cy-près* is applicable: "3. Where there is a general intention to devote the whole subject of the gift to charity, and the income of property devoted to a defined charity is from the first or subsequently becomes more than is required for the purposes of the defined charity, so that there is a surplus of income to be

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¹⁴ [1940] 1 Ch. 514, 520.

² [1924] 1 Ch. 73; 40 T.L.R. 3.

¹ (1914) 110 L.T. 688.

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“ applied.” In the present case, I think that there is not a general charitable intent in the wider and vaguer significance of that expression, but in my view there is to be found in this will a general and comprehensive intention expressed by the testatrix that the whole subject of her gift, that is to say, the whole of her residuary moneys are to be devoted to a charitable purpose. Inasmuch as here there is a surplus, I think that the matter has to be approached in a very different way from what is the method of approach where there is a pecuniary legacy, on the ground that the general intention is that the whole of the residuary estate should go and be applied for a charitable purpose. The gift is itself residuary. There is no argument here based on conflicting provisions of a will. There are specific gifts, and there is the residue, and the whole of the residue is in the testatrix’s contemplation to be devoted to a charitable purpose. The facts are that there is more money available for the limited charitable purpose in particularity or within the particulars mentioned in the will, that is to say, the seating of the church. But it is quite obvious, I think, that the testatrix wanted everything she had to be devoted to Romalldkirk Church over and above the money she gave for the window, and I think that from that fact one finds an intention to part with, so to speak, the whole of her property in favour of a charity, and from that one spells out a charitable intention which can only be carried out by the application of the *cy-près* doctrine.

For that proposition there are two cases which are of assistance. The first is a decision by the late Lord Romer, Romer J. as he then was, *In re King*,³ in which the headnote is: “ A bequest of residue to provide for the erection of a stained-glass window in a parish church to the memory of the testatrix and certain of her relations is a good charitable gift, and if the residue is more than sufficient to meet the cost of a window of the best possible character, the surplus remaining in the hands of the trustees must be applied *cy-près*.” I do not think that the judgment in that case is very helpful, particularly because I think, with great respect, that the judge quoted the wrong passage from Tyssen on Charitable Bequests. I think that the relevant passage in that book is the one which I have quoted from p. 184 which, in my view, gives the key to the solution of the present question. If the decision in *In re King*³ is right, I think that it is indistinguishable from the present case, and if I am not

³ [1923] 1 Ch. 243.

bound strictly to follow it, I certainly think that I ought to follow it. I am further fortified in my view by the second case to which I wish to refer, *In re Royce*.⁴ That again was a case of a residuary gift; a legacy and a considerable share of residue were bequeathed to the vicar and churchwardens of the parish church of Oakham "for the benefit of the choir." There was considerable argument as to what the words "for the benefit of the choir" meant; but in the result it was held that the intention of the testator was to provide a fund for the maintenance and improvement of the musical services of the church, and that being a bequest for the advancement of religion it was a valid charitable bequest. Simonds J. held further that a general charitable intention was shown by the will, but the amount being greater than could be used for the choir, a scheme was directed for the application of the surplus income. I read that case as indicating that where a testator has shown an intention to use the whole of a residue, or the remaining portion of a residue, for a charitable purpose, it is not necessary to do more than to find that intention, namely, an intention to part with the whole subject-matter of the residuary gift for a charitable purpose. It is not necessary to find a general charitable intention in the wider sense in which those words are sometimes, and perhaps more frequently, used.

In the present case, in my judgment, the testatrix has shown on the face of her will an intention to give the whole of the residue of her estate for charitable purposes. She did not intend to keep anything back. She gave no further directions. True it is that she did not leave anything to the vicar or churchwardens or the Parochial Church Council or to any other person, but merely indicated the purpose for which this money was to be applied. But I think that in this case she showed no intention whatever of leaving anything out of what she designed as an application of her residuary estate to charity.

I think that it is very necessary in these cases to remember that the application of the doctrine probably differs very much according to whether or not it is applied to residue or a share of residue. I think that where one finds a residuary gift out and out for a charitable purpose, and there is a surplus over and above what is required for that particular purpose, the overriding intention of a charitable disposition should still prevail, with the result that this surplus must be applied *cy-près* for the benefit of Romaldkirk Church.

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⁴ [1940] 1 Ch. 514; 56 T.L.R. 540; [1940] 2 All E.R. 291.

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I will make a declaration that the surplus is to be applied cy-près, and I will direct that a scheme be brought into chambers.

Declaration accordingly.

Solicitors: *Champion & Co., for Dawson, Arnott & Pickering, Barnard Castle, Durham; Treasury Solicitor.*

J. A. G.

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Apr. 12.

Harman J.

In re WEIGALL'S WILL TRUSTS.

[1955 W. No. 2711.]

Revenue—Estate duty—Annuity—Successive annuities—Annuity to brother and “in case of his predeceasing” his wife “the said “annuity” to her—Not one piece of property—New annuity arising on death of first annuitant—Incidence of duty—Partial exoneration of residue—Liability of second annuitant for rateable proportion of duty—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (1) (b).

A testator settled his entire estate on trust “for the disposal of “income and capital as hereafter provided—Of the income derived “from same . . . an annuity of £5,000 to my brother H. P. W. “and in the case of his predeceasing his wife the said £5,000 to “be paid yearly to W. B. W.”—the brother’s widow. By a codicil the testator reduced the annuity to £3,500 “in the case of H. P. W. “this latter [annuity] with reversion to W. B. W.”

The testator directed that “the remainder of the income” including the annuity, as and when released, should be payable, as to two-thirds and one-third respectively, to two nieces; and he gave the capital to the children of the nieces in the same proportions as their parents were entitled to the income of the residuary estate.

On the death of the brother, H. P. W., in the lifetime of his wife, W. B. W.:—

Held, (1) that the two annuities did not constitute one piece of property which came into existence on the death of the testator and which passed from the brother to the widow on his death, but that on his death a new beneficial interest arose which was now vested in the widow; duty was not therefore chargeable under section 1 of the Finance Act, 1894, but under section 2 (1) (b) on the cesser of the brother’s interest.

In re Austin Motor Co. Ltd.’s Policies; In re Payton, decd. [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425 applied.

In re Duke of Norfolk [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664 and *In re Cassel* [1927] 2 Ch. 275; 43 T.L.R. 743 distinguished.

(2) That, since no benefit accrued to the takers of the residuary income by reason of the falling in of the first annuity, the brother's wife should, on general equitable principles, bear part of the burden of the duty which became exigible on the death of her husband; she was therefore liable to account for interest on a rateable proportion of the estate duty payable, corresponding to the proportion which the sum required to produce the annuity bore to the whole of the residuary estate.

In re Palmer [1916] 2 Ch. 391 applied.

In re Cassel's Will Trusts [1947] Ch. 1; [1946] 1 All E.R. 704 not followed.

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ADJOURNED SUMMONS.

Alexander Gilbert Weigall, by his will dated June 11, 1930, appointed his brother, Harry Percy Weigall, as his sole executor and trustee, and provided: "My entire estate to be settled in "trust for disposal of income and capital as hereafter provided—"of the income derived from same an annuity of £1,000 to be "paid to my brother Arthur Stuart Laing Weigall and an annuity "of £5,000 to my brother Harry Percy Weigall and in the case "of his predeceasing his wife the said £5,000 to be paid yearly "to Winifred Barstow Weigall [wife of Harry Percy Weigall]—"the remainder of the income including the two annuities, as "and when released to be paid as to two-thirds to my niece "Winifred Weigall and the remaining one-third to my niece "Grace Barstow Weigall during their respective lives, and in the "case of the death of either without surviving issue her share "to revert to the survivor—the capital of the trust to be held as "to two-thirds to the surviving children of my niece Winifred in "equal parts and the remaining one-third to the surviving children "of my niece Grace Barstow in equal parts. . . ."

By a codicil dated May 9, 1932, the testator directed: "The "annuities mentioned in this will are hereby reduced to £500 "per annum in the case of Arthur Stuart Laing Weigall and "£3,500 in the case of Harry Percy Weigall, this latter with "reversion to Winifred Barstow Weigall."

The testator died on August 19, 1935. The annuitant, Arthur Stuart Laing Weigall died on March 30, 1948, and the annuitant, Harry Percy Weigall, died on May 28, 1954, predeceasing his wife, Winifred Barstow Weigall, the first defendant.

The testator's niece Winifred had married; she was the second defendant, Winifred Macfarland, and had no issue. The testator's

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niece Grace was the third defendant, Safeyyah Grace Barstow Al Arab; she had two children born in 1945 and 1950 respectively, who were the fourth and fifth defendants.

The plaintiffs, as the present trustees of the will, took out the present summons asking the court to determine: (1) whether on the true construction of the testator's will and codicil and sections 1 and 2 of the Finance Act, 1894,¹ estate duty became payable on the death on May 28, 1954, of Harry Percy Weigall (a) under section 1 of the Act, and only on the value of a continuing annuity of £3,500 per annum for the remainder of the life of the defendant, Winifred Barstow Weigall, or (b) under section 2 (1) (b) of the Act on the capital value of the proportion of the residuary estate required to produce an annuity of £3,500. (2) If question (1) should be answered in the sense of (b), whether the defendant Winifred Barstow Weigall was liable to account for interest on a rateable proportion of the estate duty so payable corresponding to the proportion which the sum required to produce the annuity bore to the whole of the residuary estate.

W. A. Bagnall for the plaintiffs, trustees of the will.

Raymond Walton for the first defendant, Winifred Barstow Weigall, widow of the annuitant, was not concerned to argue this question.

Lloyd Stott for the second defendant, the testator's niece Winifred. It is a question of construction whether there is one annuity for the two lives of Harry Percy Weigall and his wife successively and duty is exigible under section 1 of the Finance Act, 1894, or whether there are two annuities for their two respective lives successively and duty is payable under section 2 (1) (b) of the Act. The position, it is submitted on this will and codicil, is that there is only one annuity; it is one piece of property which arose on the death of the testator and continued for the lives of Harry and his wife, and there was no cesser of

¹ Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this . . . Act, there shall . . . be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate Duty,' at the graduated rates hereinafter mentioned. . . ."

S. 2: "(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . ."

interest on the death of Harry in 1954. Duty is therefore payable under section 1 of the Act on the value of a continuing annuity of £3,500 per annum for the remainder of the life of Winifred Barstow Weigall.

In *In re Duke of Norfolk*² an annuity payable during the longer of two lives was regarded as one annuity. In *In re Cassel's Will Trusts*³ (the second *Cassel* case) Romer J. held that an annuity of £8,000 to a mother and after her death an annuity of the like amount to her two daughters and the survivor of them were separate annuities, and that on the death of the mother estate duty became payable under section 2 (1) (b). That decision is not applicable to the present case, where the words of the will are totally different. It is here an almost irresistible inference—particularly when regard is had to the words of the codicil—that the testator intended only one annuity.

Ronald Cozens-Hardy Horne for the third, fourth and fifth defendants, the testator's niece Grace and her two children. These defendants are in the same interest as the second defendant, and the argument on her behalf is adopted. It is clearly established that if an annuity is given first to A and then over to B, duty is payable under section 1 of the Act, but if a new interest is created on the death of A, then duty is payable under section 2 (1) (b). It is a question of form rather than of substance.

It was held in *In re Cassel*⁴ (the first *Cassel* case) that the right to have a property kept up for the benefit of successive life tenants was a piece of property which passed on the death, and duty was accordingly payable under section 1. Russell J. held that what passed on the death of the first life tenant was the right to enjoy the annual sum required for that purpose.

E. Blanshard Stamp for the Inland Revenue Commissioners. It is not a narrow point of construction whether or not the property passed under section 1. Estate duty is not payable under that section unless the property has a continuing existence both before and after the death. It has been clearly laid down that in order to come within that section there must be an item of property which existed both before and after the death; that is axiomatic. The question in this case is whether there was what the Court of Appeal in *In re Austin Motor Co. Ltd.'s Policies; In re Payton, decd.*,⁵ described as a continuing item of property

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² [1950] Ch. 467; 66 T.L.R. (Pt.

⁴ [1927] 2 Ch. 275; 43 T.L.R. 743.

1) 695; [1950] 1 All E.R. 664.

⁵ [1951] Ch. 1081, 1092; [1951] 2

³ [1947] Ch. 1; [1946] 1 All E.R.

T.L.R. 235; [1951] 2 All E.R. 425.

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which existed before and after the death, which was identifiable and persisted independently of the beneficial interests in it. That can be illustrated by the terms of the gift in the *Duke of Norfolk's* case,⁶ although in that case it was conceded that the interest in question was one continuing annuity charged on the estate.

If there is not a piece of property which existed before and after the death, there can be no passing under section 1; one must consider not only the construction of the will but the interests created by it. The true test is whether there was property subsisting before and after the death independently of the rights of the beneficiaries in it: *Payton's* case.⁷ Here there was no gift to trustees of the property from which the annuities are derived; there is only the successive rights of enjoyment of the annuities. Nothing, therefore, passed on the death of the first annuitant Harry, and duty is payable not under section 1 but under section 2 (1) (b). There is the same distinction between this case and the *Duke of Norfolk's* case⁸ as there was between *Payton's* case⁹ and the *Duke of Norfolk's* case.¹⁰

Stott in reply. *Payton's* case¹¹ only shows that a mere chose in action does not pass under section 1; here there is a right of property, the annuitants have a right in the estate for the payment of the annuities, and the court has to see whether that interest is a continuing one.

Cozens-Hardy Horne in reply. *Payton's* case¹¹ was a very special case and was only concerned with a chose in action.

HARMAN J., having stated the facts: This summons is taken out under the Administration of Justice (Miscellaneous Provisions) Act, 1933, the Crown being interested because, apart from the incidence of the duty between the beneficiaries, the amount of duty will depend on which way question one of the summons is answered. There are two views: one is that this is a continuous piece of property which came into existence on the death of the testator and continues in existence notwithstanding the death of his brother—in which case there is a passing of that property from the brother to his widow under section 1 of the Finance Act, 1894; the other is that these are choses in action, namely, annuities, the first of which ceased on the death of the brother, upon which a new and what is usually called a reversionary annuity arose in his widow—in which case duty is exigible under section 2 (1) (b)

⁶ [1950] Ch. 467, 468.

⁷ [1951] Ch. 1081.

⁸ [1950] Ch. 467.

⁹ [1951] Ch. 1081.

¹⁰ [1950] Ch. 467.

¹¹ [1951] Ch. 1081.

of the Act. Section 2, as is well known, applies to cases where an interest does not pass on a death, but where there is a cesser of an interest on the death and a new benefit arises to somebody else.

If there were no authority on the matter I should feel no doubt that nothing passed on the death of the first annuitant; his annuity then stopped, and another annuity arose in favour of his widow. It is true that the testator treats the two as being one annuity—he does not appear to have had expert guidance—and it is argued that the question must be decided on the language which he has used; in other words, that this is a matter entirely of form and not of substance. It makes no difference, except from the point of view of duty, whether this be regarded as two annuities or as one, the difference is nil; and it seems a very strange thing that the mere chance whether a testator says “I “give an annuity to my wife and on her death I give an annuity “of a like sum to my daughter” or “I give an annuity to my “wife which is to be paid to her daughter after her death if she “survives her” will make the difference. Unless I am bound to do so I decline to hold that the difference is a mere matter of language. The actual words used in the will are: “an annuity “of £1,000 to be paid to my brother Arthur . . . and an annuity “of £5,000 to my brother Harry . . . and in the case of his “predeceasing his wife the said £5,000 to be paid yearly to “Winifred. . . .”

Of course, it is true that the testator treats the two in a sense as one, but, as has been pointed out, when he says the said £5,000 is to be paid to Winifred, he does not mean that at all; it is not the same sum which is to be paid to her; it is a like sum. It is, in my view, a new annuity. In the codicil the £5,000 is reduced to £3,500 and the testator says: “£3,500 in the case of Harry “... this latter with reversion to Winifred. . . .” In other words, if one looks at the language only—not treating it as using any term of art—the testator, as a layman may, treats the benefits to his brother and his brother’s wife as one annuity for their joint lives and the life of the survivor of them; but, in my view, the truth is that it is one annuity to the brother and an annuity of like amount to the brother’s widow if she is the survivor, and the question is whether I am bound by law to hold differently.

I begin with *In re Cassel*,¹ where the question was as to the expenditure by trustees on the upkeep of Brook House under the

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¹ [1927] 2 Ch. 275; 43 T.L.R. 743.

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testator's will. Brook House was devised to trustees on trust to allow Mrs. C. to have the use and enjoyment for life and, after her death, upon the like trust for the benefit of Lady L. for her life, and during the whole of that period or those two periods (whichever way it was looked at) the property was to be kept in repair and the rent paid out of the income of the residuary personal estate. The question was what passed on the death of the first life tenant of Brook House in respect of the right to have the place kept up out of the residuary personal estate, and Russell J. held, feeling himself bound so to do, that the property which passed was the right to enjoy the benefit of the annual sum, and that was a piece of property which itself passed on the death within section 1. He came to this decision contrary to his own opinion as he felt himself constrained by the decision of the House of Lords in *Earl Cowley v. Inland Revenue Commissioners* ² so to do, and I must say that his own opinion appeals to me as it did to him, and without authority I should never have thought that the right to enjoy the benefit of having the house kept up at the expense of residue was a piece of property which passed on the death. But, nevertheless, he felt bound so to hold because the obligation to keep up the property was independent of the beneficial interests from time to time subsisting in it and, if any one of the life tenants had renounced, it would have made no difference to the trustees' obligation to maintain, so that there was something independent there of the rights of the beneficially interested parties.

The next case to which I must refer is *In re Duke of Norfolk*,³ where real property was devised to trustees for a term of 1,000 years to support the annuities given by the Duke, and there was a gift to the trustees of an annuity of £3,000 starting at the death and to continue payable during the longer of two lives. It was there conceded by the Crown that that was to be treated as a single annuity. Jenkins L.J. said this⁴: "It is not in dispute that, on the true construction of the relevant provisions of the will and codicils, the interest in question is in truth one continuing annuity (charged on the estates comprised in the 1,000 year term) for the longer of the lives of the two annuitants, and cannot be regarded as comprising two successive annuities, the first ceasing and the second commencing on the death of the late viscount."

² [1899] A.C. 198; 15 T.L.R. 270.

⁴ [1950] Ch. 482.

³ [1950] Ch. 467; 66 T.L.R. (Pt.

1) 695; [1950] 1 All E.R. 664.

There was, therefore, no argument on that subject, and I regret that there was not. It may be that the concession was well made, having regard to the term of 1,000 years limited to the trustees to uphold the annuity. There those trustees, as termors, had a duty to set aside out of the rents and profits of the realty an annual sum, that is to say, £3,000 a year during the life of the survivor of two named persons. That was treated as a piece of property, having, so to speak, an existence independent of the lives of the persons enjoying the benefit of it. Whether rightly or wrongly, that was the concession made and the Crown, nevertheless, claimed that, even on that view, they were entitled to duty on a certain footing. It was held that they were wrong. It is, therefore, no authority for the proposition that an annuity given for two lives is necessarily one annuity.

In *In re Cassel's Will Trusts* ⁵ (the second *Cassel* case) Romer J., treating the question as one of construction, said that the annuities there—so much a year to a mother and, after her death, to her two daughters and the survivor of them—were separate annuities. It is true that he treated it as a question of construction; but the Crown submits here that it is not altogether a question of construing the language but a question of substance rather than of form, whether there is something which has an existence independent of the beneficial interests from time to time subsisting in it. Unless there be such a thing, there is nothing to pass, because under section 1 something must pass and, if there is no item of property to pass, section 1 is not the charging clause applicable. It is said that here there is no property independent of the rights of the two annuitants and that the first *Cassel* case ⁶ is distinguishable because there was there, as I have pointed out, something which existed independently of the rights of the beneficiaries; and that the point may have been rightly conceded, in the *Duke of Norfolk's* case,⁷ as a term of years in the trustees may make a difference. However that may be, the Crown argues that in the present case one cannot find one piece of property—there are two several rights in two several persons. That is said to be supported by *In re Austin Motor Co. Ltd.'s Policies; In re Payton, decd.*⁸

That case is very different from the present in that it arose under a pension scheme and not under a will, under covenant and

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⁵ [1947] Ch. 1; [1946] 1 All E.R.

⁷ [1950] Ch. 467.

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⁸ [1951] Ch. 1081; [1951] 2 T.L.R.

⁶ [1927] 2 Ch. 275.

235; [1951] 2 All E.R. 425.

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not under benefaction, but the Court of Appeal did lay down the general proposition in these terms⁹: "that for section 1 of the Finance Act, 1894, to be applicable there must be property passing, that was some property identifiable and persisting independently of the beneficial interests in it." It was held in that particular case that the only right of property which emerged from the policies was a chose in action and that a mere chose in action could not be considered or apprehended apart and separately from the right to enjoy the benefit contracted to be given.

The *Duke of Norfolk's* case¹⁰ and *Cassel's* case¹¹ were distinguished in the judgment of the court,¹² and it was said that in neither of those cases was there a mere chose in action but something more, which was a piece of property. It is easy to see that this was so in *Cassel's* case,¹³ although it is not so easy in the *Duke of Norfolk's* case,¹⁴ but, as I have pointed out, that was a conceded matter. In the present case I cannot see that there is anything but a mere chose in action arising in favour of the two beneficiaries successively on the death of the testator and on the death of the first taker, and, as it seems to me that nothing passed on the death of the testator's brother, I do not find that I am bound by authority to hold that anything did pass. I feel at liberty, particularly having regard to *Payton's* case,¹⁵ to follow my own view and to hold that nothing passed, but that a new beneficial interest arose upon the death of the testator's brother which is now vested in the first defendant, and that the consequences which follow from that are that the charging section is section 2 (1) (b) and not section 1.

Argument was then heard on question 2.

Walton. The present annuitant should not be liable for any duty in respect of this annuity, although it is not disputed that if any duty has to be paid it should be in the form laid down in *In re Palmer*.¹ *In re Cassel's Will Trusts*² (the second *Cassel* case) is strongly relied on in support of the submission that she is not liable for any of the duty arising on the death of her husband. That decision is on all fours with this case.

⁹ [1951] Ch. 1081, 1082.¹⁰ [1950] Ch. 467.¹¹ [1927] 2 Ch. 275.¹² [1951] Ch. 1081, 1092.¹³ [1927] 2 Ch. 275.¹⁴ [1950] Ch. 467.¹⁵ [1951] Ch. 1081.¹ [1916] 2 Ch. 391.² [1947] Ch. 1; [1946] 1 All E.R.

Stott. A proportionate part of the estate duty which falls to be paid should be borne by the annuitant. On the basis of the decision in *In re Cassel's Will Trusts*² the annuitant could not be called on to bear any of the duty, but on the basis of *In re Palmer*,³ however, she would be liable to do so. The present case is nearer to *In re Palmer*³ than *In re Cassel's Will Trusts*.⁴

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Cozens-Hardy Horne. Apart from authority there is no reason why the residuary legatees should bear the duty rather than the annuitant, for the residuary estate does not benefit by this cesser of the annuity of £3,500, since another annuity of like amount springs up immediately.

*In re Palmer*⁵ is direct authority for holding that the proportionate part of the duty should be borne by the annuitant. It is admitted that it is difficult to reconcile that decision with *In re Cassel's Will Trusts*,⁶ but there is no difference between the position here and *In re Palmer*.⁷ That case, which adopted principles as to the payment of duty laid down in *In re Parker-Jervis*,⁸ should be followed.

HARMAN J. This question is ancillary to the first question and concerns the incidence of the duty, which is exigible on the slice of the estate notionally (and not in reality) necessary to support the fallen annuity. There has been no appropriation here; nothing falls into residue by reason of the death. The duty must be paid by the trustees of the will having regard to section 8 of the Act, since they have the fund charged with the annuities in their hands.

The question is whether the whole of the diminution of income which will be brought about by the payment has to be borne by those taking (in the words of the will) "the remainder of the "income," or whether the loss ought to be spread rateably over between them and the new annuitant, the first defendant. She contends that she should be exonerated; they say that she should not.

This case bears a very strong resemblance to a decision of the Court of Appeal in *In re Palmer*,¹ where there was an annuity of £3,000 to "A" charged on the general residue and, on his death, there sprang up another annuity of a like amount to "B";

² [1947] Ch. 1.

³ [1916] 2 Ch. 391.

⁴ [1947] Ch. 1.

⁵ [1916] 2 Ch. 391.

⁶ [1947] Ch. 1.

⁷ [1916] 2 Ch. 391.

⁸ [1898] 2 Ch. 643.

¹ [1916] 2 Ch. 391.

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and, it being agreed there that it was a case under section 2 (1) (b), the question was how the duty ought to be borne. It was not even suggested, for some reason or other, that the £3,000 to the second annuitant should be exonerated. What had happened before Younger J.² was that the whole burden had been put upon the annuitant, and against that he appealed. The Court of Appeal³ held that a rateable appropriation over the whole estate was the right way to deal with the matter and, in effect, the taker of the £3,000 a year was treated as a person taking an aliquot part of the settled estate and had to bear an aliquot part of the burden accordingly. In that case the residue of the income was being accumulated, the period of accumulation not having then run out.

That appeals to me as a just way of dealing with the matter on general equitable principles because, in fact, no benefit accrued to the takers of the residuary income by reason of the falling in of the first of these annuities because an exactly similar one springs up in its stead. If that were the only case, therefore, there would not seem to be any very great difficulty in concluding that *In re Parker-Jervis*⁴ shows the right method of deciding the question.

It seems also to be in accord with section 14 of the Finance Act, 1894, by which it is provided that in the case of property which does not pass to the executor as such—that is undoubtedly the case here—an amount equal to the proper rateable part of the estate duty may be recovered by the person authorized or required to pay the estate duty in respect of any property and having paid such duty. Here the trustees have paid such duty. From whom may they recover it? From the person entitled to any sum charged on such property whether as capital or as an annuity or otherwise under a disposition not containing any express provision to the contrary.

There is no express provision to the contrary here, so that it would seem, under that section, that the trustees may recover a rateable part of the duty from the annuitant. This is said, however, to be inconsistent with the decision of Romer J. in *In re Cassel's Will Trusts*.⁵ In that case two annuities sprang up in favour of the daughters of a first annuitant and one of the

² [1916] 1 Ch. 395.³ [1916] 2 Ch. 391.⁴ [1898] 2 Ch. 643.⁵ [1947] Ch. 1; [1946] 1 All E.R. 704.

questions was how the burden ought to be borne. Romer J., in a reserved judgment, held that the annuities had priority to residue and that no part of the burden ought to be thrown on them, and he distinguished *In re Palmer*⁶ from his case by saying⁷: "the new . . . annuity was payable solely out of "the fund which benefited by the cesser of the old annuity, "namely, the 'settled residue.'" That is the position in this case; the new annuity is payable solely out of the fund which, in a sense, benefited from the cesser of the old one. It is payable out of the same fund.

Then Romer J. continued⁸: "That is not, in my opinion, "the position here." He suggested that the annuity there was payable out of what was called the settled fund and not out of the residue and, therefore, the residue had to bear the duty just as it would have done had there been an appropriation.

That leaves me, I confess, in some embarrassment; I do not follow the ground on which Romer J. decided that point. I do feel the force of this; that Mr. Stott's and Mr. Cozens-Hardy Horne's clients only get the remainder of the income, and it may be said, therefore, that the annuity must in all cases have priority, but that was not the way the matter was decided in *In re Palmer*,⁹ and it does seem to me here that where there is a slice taken of the whole of the fund which is answerable for both the annuity and the other income payments, and where the residue gets no benefit by the cesser of the old annuity, because a new one springs up exactly in the same terms, equity demands that the various sums charged on the entirety should bear the duty rateably between them. That is what was done in *In re Palmer*⁹ by the Court of Appeal, and, notwithstanding the different view taken by Romer J. in *In re Cassel's Will Trusts*,¹⁰ I feel that is the right view to follow. It seems to me that this is a proper instance of a *Parker-Jervis*¹¹ distribution and, notwithstanding *Cassel's* case,¹² it would not be right that the new annuitant should not bear some part of the burden of the duty which has become exigible by the reason of the benefit which has accrued to her on the death of her husband. I propose to declare that the defendant Winifred Barstow Weigall is liable to account for interest on a rateable proportion of the estate duty payable,

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⁶ [1916] 2 Ch. 391.⁷ [1947] Ch. 1, 21.⁸ *Ibid.* 21.⁹ [1916] 2 Ch. 391.¹⁰ [1947] Ch. 1.¹¹ [1898] 2 Ch. 643.¹² [1947] Ch. 1.

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corresponding to the proportion which the sum required to produce the annuity bears to the whole of the residuary estate.

Declarations accordingly.

Solicitors: *Kerly, Sons & Karuth; Child & Child; Clarkson, Wright & Jakes; J. L. Freedman & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

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18, 29.

In re WESTERN MANUFACTURING (READING) LTD.

(APPLICATION OF G. H. MILES.)

Wynn-Parry J.

[00587 of 1955.]

Company—Amalgamation—Scheme for acquisition of shares by transferee company—Offer expressed to be open for about three weeks—Statutory provision for approval within four months after making of offer—Approval by holders of nine-tenths in value of shares of transferee company—Statutory notice to dissenting shareholder of compulsory acquisition—Meaning of “within four months of the making of the offer”—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), s. 209 (1).

Company—Shares—Valuation—Middle market quotation—Satisfactory guide.

Judicial Precedent—Dominion decision—Weight—Desire for uniformity of law.

On February 11, 1955, W. Ltd. issued to its shareholders a circular announcing a scheme for its amalgamation with A. Ltd. whereby A. Ltd. would acquire the shares in W. Ltd. The circular provided that the offer was conditional on being accepted on or before March 4, 1955, or such later date as might be agreed between the two boards, in respect of not less than 90 per cent. of the issued shares of W. Ltd. By agreement the date for acceptance was extended and, in the result, the holders of over nine-tenths in value of the shares in W. Ltd. accepted the offer. The applicant on this summons held 3,585 shares out of 2,131,104, and in due course A. Ltd. served on him, pursuant to section 209 (1) of the Companies Act, 1948,¹ a notice that it desired to acquire his shares

¹ Companies Act, 1948, s. 209 (1):
“Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as ‘the

“transferor company”) to another company, whether a company with-
“in the meaning of this Act or not (in this section referred to as ‘the
“transferee company”), has, within

on the terms of the offer contained in the circular. By this summons, issued in July, 1955, he asked for an order, pursuant to the subsection, that A. Ltd. was not entitled to acquire his shares in W. Ltd., or any of the shares therein, on the terms of the scheme or contract dated February 11, 1955, notwithstanding that the same had been approved by the holders of nine-tenths in value of the shares whereof the transfer was involved. For the applicant it was contended that the offer had to remain open for four months and that it was issued on February 11, 1955, and itself expressly provided that it must be accepted by March 4, 1955.

The circular stated, as a guide to the shareholders, the middle prices on the Stock Exchange on certain dates:—

Held, in deciding that the notice to the applicant was valid and dismissing the summons: that, in section 209 (1), the phrase “within four months after the making of the offer” did not denote a fixed period during the whole of which the offer must remain open, but described a maximum period during which the event contemplated might occur; and that it was competent to A. Ltd. to fix a period within, but shorter than, the four months, during which the offer must be accepted.

In re Evertite Locknuts Ltd. [1945] Ch. 220; 61 T.L.R. 274; [1945] 1 All E.R. 401 and *In re Press Caps Ltd.* [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.; [1948] 2 All E.R. 638 considered.

Rathie v. Montreal Trust Co. [1953] 2 S.C.R. 204; 4 D.L.R. 289 distinguished.

Held, further, that, as there were not, in the present case, circumstances showing that the middle market quotation on the London Stock Exchange for the shares of the two companies was not a satisfactory guide in ascertaining the value of those shares, that quotation was to be taken as a reliable guide in preference to share markings.

ADJOURNED SUMMONS.

This was a summons taken out on July 12, 1955, by the applicant, George Herbert Miles, to which the respondents were Adamant Engineering Co. (Luton) Ltd. (hereinafter called “Adamant”) for an order [*sic*] that Adamant was neither

“four months of the making of the
“offer in that behalf by the trans-
“feree company been approved by
“the holders of not less than nine-
“tenths in value of the shares whose
“transfer is involved (other than
“shares already held at the date of
“the offer by, or by a nominee for,
“the transferee company or its sub-
“sidiary), the transferee company
“may, at any time within two
“months after the expiration of the
“said four months, give notice in the
“prescribed manner to any dissenting

“shareholder that it desires to ac-
“quire his shares, and when such a
“notice is given the transferee com-
“pany shall, unless on an application
“made by the dissenting shareholder
“within one month from the date on
“which the notice was given the
“court thinks fit to order otherwise,
“be entitled and bound to acquire
“those shares on the terms on which,
“under the scheme or contract, the
“shares of the approving share-
“holders are to be transferred to the
“transferee company. . . .”

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entitled nor bound to acquire the applicant's shares in the capital of Western Manufacturing (Reading) Ltd. or any of those shares, on the terms of a scheme or contract dated February 11, 1955, notwithstanding that the same had been approved by the holders of nine-tenths in value of the shares whereof the transfer was involved therein.

The facts are stated in the considered judgment of Wynn-Parry J.

R. B. S. Instone for the applicant. On the true construction of section 209 (1) notice to acquire the applicant's shares has not been given "in the prescribed manner." Unless an offer is open for acceptance or refusal for at least four months there is not a "scheme or contract" within the subsection: *Rathie v. Montreal Trust Co.*² That is the time during which the offer must remain open. Adamant's offer, however, was conditional on its acceptance by a date little later than three weeks after it had been made. In *Rathie's* case² Locke J. said that Parliament's intention in providing that the transferee company could not, until four months after the making of the offer, apply for an order that dissenting shareholders should transfer their shares on the terms of the offer was³ "to enable the shareholders to make "such investigation as they might think desirable to enable them "to determine whether the offer was fair and one which they "might wish to accept"; and Rand J. referred to *In re Evertite Locknuts Ltd.*⁴ and *In re Press Caps Ltd.*,⁵ and said⁶: "The "proposal must also remain open for approval by any shareholder "for the four months mentioned, otherwise the postponement of "the right to proceed by notice against the dissenting shareholder "until after the expiration of that period would scarcely make "sense."

Secondly, the offer was an unfair one and for that reason also does not come within section 209 (1). Until 1948 Western was known as Miles Aircraft Ltd., and has since, under a creditors' scheme of arrangement, been built up into a successful engineering company. The offer was unfair because the partnership in the new company was to be on a "fifty-fifty" basis, notwithstanding that Western was bringing in more assets. As a result of the merger the paper profit to Western's shareholders on the Stock

² [1953] 2 S.C.R. 204; 4 D.L.R. 289.

³ [1953] 2 S.C.R. 204.

⁴ [1945] Ch. 220; 61 T.L.R. 274; [1945] 1 All E.R. 401.

⁵ [1949] Ch. 434; [1949] 1 All E.R. 1013, C.A.; [1948] 2 All E.R. 638.

⁶ [1953] 2 S.C.R. 204.

Exchange prices was, on the basis of the middle market quotation, 1s. 9d. per share. It was misleading, however, to base the profit on the middle market quotation, for the markings for shares in the company show that paper profit at 1s. 4d.

P. J. Sykes for the respondents. *Rathie v. Montreal Trust Co.*⁷ does not bind this court. It was decided on a section different from section 209 and, in any event, is wrong. Locke J.'s view of Parliament's intention in providing that a transferee company could not until four months after the making of the offer apply for an order that a dissenting shareholder should transfer his shares was not warranted by the language of the subsection which he was construing. "Within four months" refers to the approval of the contract by the holders of not less than nine-tenths of the shares affected, and means that the offer must be accepted by that time, not that a shorter time for acceptance cannot be stipulated. Within that period of four months an earlier time can be fixed, as has in fact been done in the present case. The language of the English and of the Canadian statute is plain and there is no need to read anything into either of them and so no justification for doing so: *Tinkham v. Perry*.⁸ [Reference was made to *In re Evertite Locknuts Ltd.*⁹ and *In re Press Caps Ltd.*¹⁰]

As to merits, the applicant is alone in applying for the order and holds only .168 per cent. of the share capital. The onus is on him to show why his shares should not be acquired: see *per* Maugham J. in *In re Hoare & Co. Ltd.*¹¹

Cur. adv. vult.

1955. Nov. 29. WYNN-PARRY J. This is a summons under section 209 of the Companies Act, 1948, by which the applicant asks for a declaration that the respondents, Adamant and Western Engineering Ltd., are neither entitled nor bound to acquire the shares of the applicant in the capital of Western Manufacturing (Reading) Ltd. (to which I will refer as "the company"), on the terms of a scheme or contract dated February 11, 1955, notwithstanding that it has been approved by the holders of nine-tenths in value of the shares whose transfer is involved.

On February 11, 1955, the company issued a circular to the whole of its shareholders. At the head of the circular it is stated

⁷ [1953] 2 S.C.R. 204.

⁹ [1945] Ch. 220.

⁸ [1951] 1 K.B. 547; [1951] 1 T.L.R. 91; [1951] 1 All E.R. 249.

¹⁰ [1949] Ch. 434.

¹¹ (1933) 150 L.T. 374.

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in red ink: "This document is important. If you require
" advice you should consult your stockbroker, banker or
" solicitor without delay as the offer contained herein lapses on
" March 4, 1955".

The circular opens as follows: "As you may have seen in
" the Press, on December 9, 1954, the directors of your com-
" pany held a meeting with the directors of Adamant Engineering
" Company (Luton) Ltd. (hereinafter called 'Adamant') at
" which agreement was reached in principle on a scheme for
" the amalgamation of the two companies. The two boards had
" previously sought an impartial opinion from Lazard Brothers
" & Co., Ltd. as to the method by which a merger could be
" brought about, and the terms which would be fair to the share-
" holders of both companies. They have been advised that the
" amalgamation can most conveniently be effected by Adamant
" (which is already a holding company) acquiring the shares of
" your company, and accordingly I am now authorized to
" transmit to you the following offer by Adamant in accordance
" with formal letters dated February 3, 1955, exchanged
" between the directors of the two companies. 1. 'Subject to
" the conditions mentioned below, Adamant offers to acquire
" all the shares of 5s. each of your company in exchange for
" new Shares of 5s. each of Adamant to be issued credited as
" fully paid up on the basis of one new share of Adamant for
" every two existing shares of your company.'"

Paragraph 5, so far as material, reads as follows: "The offer
" is conditional upon: (a) the offer being accepted on or before
" March 4, 1955, or such later date as may be agreed between
" the boards of the two companies in respect of not less than
" 90 per cent. of the issued shares of your company or such
" less percentage as may be decided by Adamant after consulta-
" tion with your board.'"

The date for acceptance was extended by agreement and in the
result the offer was accepted by over 98 per cent. of the holders
of shares in the capital of the company. The applicant is the
holder of 3,585 shares in the company out of a total issued
capital of £532,776 divided into 2,131,104 shares of 5s. each.
His holding, therefore, represents, according to the calculations
of counsel, .168 per cent. of the issued capital.

The respondents in due course served on the applicant a
notice pursuant to section 209 of the Companies Act, 1948, to
the effect that they desired to acquire the applicant's shares on
the terms of the offer contained in the circular. The applicant,

however, objects to having his shares acquired on those terms, and puts forward two objections.

One of these objections goes to the question of jurisdiction, and I propose to deal with it first. Put shortly, it is that the notice served on him was not a notice given pursuant to a scheme or contract to which section 209 of the Companies Act, 1948, applies, because to fall within the section the offer involved must remain open for four months, whereas in the present case the offer was issued on February 11, 1955, and provided that it must be accepted by the holders of not less than 90 per cent. of the issued shares of the company by March 4, 1955, a period of just over three weeks, or such later date as might be agreed between the boards of the two companies. The second point taken on behalf of the applicant was that the offer was not a fair offer, and was not one on the basis of which the court would countenance the acquisition by the respondents of the applicant's shares against his will.

Mr. Sykes, for Adamant, took a procedural point: he argued that the validity of the notice to acquire could not be challenged by the applicant in the present proceedings, in which the notice must be treated as valid, and that such challenge must be made in separate proceedings. He made it clear, however, that his objection was no more than procedural, and that he desired to meet the challenge in this or other proceedings. For myself, I do not feel any difficulty in dealing with the issue as to the validity of the notice in these proceedings. In my view it is open to the applicant to say that the notice is invalid because the requirements of the section have not been complied with, and then to contend alternatively, if his first point is not held to be a good one, that the offer was an unfair one. I therefore turn to deal with the submission that the notice was not made in pursuance of a scheme or contract to which section 209 of the Companies Act, 1948, applied.

The basis of Mr. Instone's point for the applicant is that the words in section 209 (1) of the Companies Act, 1948, "within four months after the making of the offer in that behalf" denote a fixed period, during the whole of which the offer must remain open, and not a maximum period, in which case it could be provided that the offer should remain open for a shorter period.

In support of the former construction the case of *Rathie v. Montreal Trust Company*¹ was relied on. The headnote

¹ [1953] 2 S.C.R. 204; 4 D.L.R. 289.

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reads as follows: "Section 124 (1) of The Companies Act, 1934 (Canada) chapter 33, provides that where when any contract involving the transfer of shares in one company has within four months after the making of the offer been approved by the holders of not less than nine-tenths of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months give notice in such manner as may be prescribed by the court, to any dissenting shareholder that it desires to acquire his shares, and where such notice is given the transferee shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the contract, the shares of the approving shareholders are to be transferred to the company. The respondent trust company, acting on behalf of an undisclosed principal, on December 1, 1950, made an offer to the shareholders of the common stock of the respondent pulp and paper company to purchase their shares at \$200 per share, subject to the offer being accepted by December 15, 1950, by the holders of not less than 90 per cent. of the shares. It further provided that it should not be bound to accept or pay for any shares not deposited with it by that date. The holders of more than the required percentage accepted and complied with the terms of the offer, but the appellant did not, nor did the intervenants. On April 15, 1951, upon application of the respondents, Coady J. made an order under section 124 (1) of the Act authorizing the trust company to notify the shareholders who had not accepted the offer that it desired to acquire their shares under its terms and that, unless upon an application made by any of them within one month from the date upon which notice was given them the court should otherwise order, the trust company would be entitled to acquire their shares on such terms. The appellant then brought action naming the respondents as defendants, claiming a declaration that the trust company was neither entitled nor bound to purchase his shares, nor the plaintiff bound to sell or transfer them to it, and that section 124 was ultra vires, and alternatively that its provisions did not apply to the plaintiffs' shares. He also moved for an order setting aside the ex parte order made by Coady J. The latter dismissed the action and the motion. An appeal to the Court of Appeal for British Columbia was also dismissed. Held:

“ That the language of section 124 (1) of the Companies Act
 “ contemplates that the offer shall be open for acceptance for
 “ a period of four months after its making by those to whom it
 “ is made. Where the offer, as in this case, does not comply
 “ with the terms of the subsection, the offeror is not entitled to
 “ invoke the assistance of the court to compel the dissentients
 “ to transfer their shares.”

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The first judgment was given by Locke J. on behalf of himself and four other members of the court. In the course of his judgment Locke J. said²: “ The offer of the Montreal Trust Company, it is to be noted, was made subject to the condition that it should be accepted in the manner specified on or before a date fourteen days after the date of the offer by the holders of not less than 90 per cent. of the shares. As to those who did not accept within that time, the offer read: ‘ The trust company may, but shall not be bound, to accept deposit of or to pay for any shares not deposited on or before December 15, 1950.’ The appellant contends that such an offer is not within the terms of the section. For the respondents it is said that, since it was shown that within two weeks it was accepted by the holders of more than 90 per cent. of the shares, they are entitled to invoke the provisions of the first paragraph of subsection (1) for the compulsory acquisition of the shares of those who did not accept the offer. The point was carefully considered by Coady J., who was of the opinion that an offer open only for this limited period complied with the requirements of the section. With great respect, I am unable to agree. The trust company’s offer was open for acceptance for a period of two weeks only: for the remainder of the four month period after the making of the offer the company might, at its option, decline to purchase the shares of any of those who had not accepted on or before December 15, 1950. In my opinion, the language of subsection (1), ‘ Where any contract involving the transfer of shares or any class of shares in a company . . . to any other company . . . has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths of the shares affected . . . ’ contemplates that the offer shall be open for acceptance for the period of four months by those to whom it has been made. The procedure authorized by the first paragraph of subsection (1) enables the transferee company, if the offer is not accepted,

² [1953] 2 S.C.R. 204, 210.

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“ to apply to the court for an order that the dissenting shareholders transfer the shares on the terms of the offer. The intention of Parliament in providing that such an application could not be made until four months after the making of the offer was, in my opinion, to enable the shareholders to make such investigation as they might think advisable to enable them to determine whether the offer was fair and one that they wished to accept. I cannot think that it was contemplated that the offeror might limit the period within which the offeree might make these inquiries in such manner as might suit his own convenience. If the time for acceptance might be limited to two weeks, it might, of course, be limited to a much shorter period and afford the shareholders a wholly inadequate opportunity to make such inquiries as they saw fit to make before deciding upon the acceptance or rejection of the offer. As, in my opinion, the offer made did not comply with the terms of the subsection, the respondents were not entitled to invoke the assistance of the court to compel the dissentients to transfer their shares.”

The second judgment was delivered by Rand J. on behalf of himself and Taschereau J. In the course of it Rand J. said³: “ The language of this section, which appears within a fasciculus headed, ‘ Arrangements and Compromises,’ may have been clear to the draftsman, but I confess that it presents to me many difficulties of construction. What, for instance, does the word ‘ contract,’ even including an ‘ offer of exchange ‘ and any plan or arrangement,’ mean? With whom is the contract made? Certainly not with the shareholders; both the singular number and the fact that their individual acceptances would be necessary exclude that; and I doubt that the word ‘ exchange,’ although in one sense including purchase, is an exemplary use of language. Then the contract, within four months after the ‘ making of the offer,’ is to be ‘ approved.’ If the offer is to be made direct to the shareholders, it is quite impossible to say that in the ordinary case it could be made on a particular day from which the four months would be computed; and the word ‘ approved ’ is quite out of place if used in relation to such an offer. By subsection (2) the transferor company is to change the register upon receipt of a copy of a notice sent out to the dissenting shareholder, which would be an extraordinary mode of dealing with registered titles were

³ [1953] 2 S.C.R. 204, 212.

" that copy the only matter of record before the transferor company.

" In view of these difficulties, I am bound to interpret the section as contemplating, in the practical working out of a business scheme, an offer or plan or arrangement submitted by the proposed transferee to the transferor company and by the latter to its shareholders for approval. That was the course pursued in *In re Evertite Locknuts Ltd.*⁴ and *In re Press Caps Ltd.*⁵; the proposal was accompanied by a letter from the directors to the shareholders recommending acceptance. In that way the date of the 'making of the offer' is fixed by its delivery to the transferor company; meaning is given to the word 'approved'; and the notice to the dissenting shareholder as received by the transferor takes its place in the records of that company as arising out of the proposal already received. The proposal must also remain open for approval by any shareholder for the four months mentioned, otherwise the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of that period would scarcely make sense. I should say, too, that every shareholder who approved the proposal would be entitled to compel the transferee to purchase his shares, but there seems to be no obligation to acquire shares of dissenting shareholders."

It will thus be seen that two grounds are put forward for the view that the offer must remain open for four months; first, the presumed intention of Parliament to provide a sufficiently long period in which the shareholders may make investigations; and secondly, the view that the postponement of the right to proceed by notice against the dissenting shareholder until after the expiration of the period of four months would otherwise hardly make sense. Now, although that decision is not binding on me, even as a judge of first instance, it is one which should of course be examined and treated with the greatest respect. Further, I am bound to bear in mind, and I do bear in mind, what was said by the Privy Council in *Trimble v. Hill*.⁶ In the course of his judgment Sir Montague Smith said⁷: "Their Lordships would not have felt themselves justified in advising Her Majesty to depart from the decision in *Diggle v. Higgs*⁸ unless they

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⁴ [1945] Ch. 220; 61 T.L.R. 274;
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⁵ [1949] Ch. 434; [1949] 1 All
E.R. 1013, C.A.; [1948] 2 All E.R.
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⁶ (1879) 5 App.Cas. 342.

⁷ Ibid. 345.

⁸ (1877) 2 Ex.D. 422.

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"entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since in their view it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same." Nevertheless, it is incumbent on me to construe section 209 of the Companies Act, 1948, for myself, bearing in mind that provision equivalent to subsection (2) does not appear in the Canadian Companies Act, and in the light of the relevant English decisions.

First let me deal with the intention which Locke J. attributed to Parliament to give the offeree shareholder a sufficiently long period in which to investigate the merits or demerits of the offer. In *Tinkham v. Perry*⁹ Evershed M.R. said in the course of his judgment¹⁰: "Words plainly should not be added by implication into a statute unless it is necessary to do so to give the language sense and meaning in its context. . . ." In doing so he was doing no more than reiterating a long and well-established principle. The decided cases appear to me to indicate that a shareholder whose shares are made the subject of such a scheme or contract as is contemplated by section 209 of the Companies Act, 1948, has very limited rights (if any) to further information than that given in the circular setting out the terms of the offer. In *In re Evertite Locknuts Ltd.*¹¹ Vaisey J. said in the course of his judgment¹²: "The applicant does not say, and does not attempt to say, that the offer of 1s. 3d. for each 1s. share, which is made to him in common with the rest of the ordinary shareholders is an unfair offer, or an inadequate price. What he says is that at the time when the offer was made, and when he was called on to consider whether or not he should accept it, he was without sufficient, or perhaps without any, information as to certain relevant facts on which he could have based his conclusion one way or the other. That grievance or complaint is obviously one which he cannot urge against the respondents to the present summons, who are not the transferor company under the section, but the transferee company. It may be that he could, by appropriate proceedings against the transferor company, have compelled a disclosure of documents or other information sufficient to satisfy him, or, at any rate, which would be regarded by the court as sufficient to satisfy

⁹ [1951] 1 K.B. 547; [1951] 1 T.L.R. 91; [1951] 1 All E.R. 249.

¹¹ [1945] Ch. 220.

¹² Ibid. 223.

¹⁰ [1951] 1 K.B. 547, 549.

“him. I am bound to say that I think the information which
 “he received was a little meagre. The point was that
 “the transferor company, the name of which is the Evertite
 “Locknuts (1938) Ltd., had as its principal asset a large holding
 “of shares in another company, known as Nuts & Bolts (Dar-
 “laston) Ltd. What the applicant says is that the directors of
 “the transferor company withheld from him information in their
 “possession, or under their control, with regard to the position or
 “prospects of Nuts & Bolts (Darlaston) Ltd. I have really no
 “materials before me which will enable me to say either that
 “any information with regard to that company was withheld,
 “or whether, if so, it was withheld improperly. The difficulty
 “I feel is that, if once it is conceded that a scheme of this kind
 “can be upset merely for the reason that a shareholder is not
 “given all the information which he might require or might
 “expect from the directors of the transferor company, there
 “would be no limit to the inquiry which would have to be set
 “on foot as to the extent to which his demands for disclosure
 “ought to be conceded. It is, of course, possible that the present
 “applicant has some grievance against the directors of Evertite
 “Locknuts (1938) Ltd., but I am quite satisfied in my own
 “mind that I should be going much further than Maugham J.
 “was prepared to go in *In re Hoare & Co. Ltd.*¹³ if I said that
 “it was not necessary for a dissentient shareholder, making an
 “application under the Act, to establish unfairness, but that it
 “would suffice if he merely said that he regarded himself as, or
 “was in fact, unprovided with all the materials on which he
 “could come to a just conclusion in regard to the acceptance or
 “rejection of the offer.” It will be observed that the judge left
 open the question whether or not an applicant on a summons
 such as this could obtain an order for discovery of documents.
 However, in the later case of *In re Press Caps Ltd.*¹⁴ Roxburgh J.,
 refusing an order for discovery, said: “I do not feel able to
 “say that any special circumstances have been disclosed which
 “would justify an order for discovery in this case. In reaching
 “that conclusion I have taken into account not only the matters
 “which I have specially mentioned, but also the nature of the
 “section under which this application is being made, section 209
 “of the Companies Act, 1948. I have also taken into account,
 “as I think I ought to take into account, the serious consequences

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¹³ (1933) 150 L.T. 374.

¹⁴ [1949] Ch. 434; [1948] 2 All
E.R. 638, 639; [1949] 1 All E.R.
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“ which might follow if the holder of one per cent. of the shares
“ of a company should in any large number of cases become
“ entitled by making an application under this section to obtain
“ an extensive investigation of the company’s affairs. That
“ remark is not directed to this particular application, but is
“ intended to be of general application. Accordingly, I dismiss
“ this motion with costs.”

In the light of these authorities I should feel considerable difficulty in attributing to Parliament the intention of providing a fixed period of four months during which an offer must remain open in order that shareholders may have an opportunity of investigating the merits or demerits of the offer. Nor, again speaking with the greatest respect, should I have thought that the circumstance that the exercise by the transferee company of the right to proceed by notice against the dissenting shareholder was by the section postponed for four months was conclusive of the construction of the preceding phrase, “ within four months after the making of the offer,” although I agree that it is a consideration to be borne in mind.

My task, as I see it, is to construe the critical phrase “ within four months after the making of the offer ” as it stands in section 209 of the Companies Act, 1948, read as a whole. First construing the phrase by itself, I would say that it indicates not a fixed period to the end of which the offer must remain open but a maximum period during which the event contemplated, namely, approval of the offer by the holders of not less than nine-tenths in value of the shares, whose transfer is involved, must occur, if the right of the transferee company to acquire the share of a dissentient shareholder is to arise. To say that something must be approved within four months appears to me to allow any date within that period to be fixed for such approval. This construction appears to me to be borne out by a consideration of the rest of the section. In addition to the phrase which I have been considering, there are four somewhat similar periods mentioned in the section. First there is the phrase in subsection (1): “ within two months after the expiration of the “ said four months.” Secondly, there is the phrase, also in subsection (1): “ within one month from the date on which the “ notice was given.” Thirdly, there is the phrase in subsection (2) (a): “ within one month of the date of transfer ”; and fourthly, the phrase in subsection (2) (b): “ within three months “ from the giving of the notice.” Now, it will be observed that in the case of each of those four phrases the period is the

maximum period during any moment of which the event contemplated may occur. In the light of this it would be odd indeed if the first phrase of all had to be construed in a different sense, namely, as describing a fixed period until the expiration of which one must wait in order to see whether the event contemplated has or has not occurred.

The matter, however, does not end there. It appears to me that the critical moment for ascertaining whether the obligation thrown on the transferee company under paragraph (a) of subsection (2) has arisen cannot possibly be the expiration of a fixed period, but must be that moment of time when the condition is fulfilled, namely, that as a result of a transfer of shares in the transferee company, the transferee company, taking into account shares in the transferor company already held or acquired by it, holds 90 per cent. or more of the issued share capital of the transferor company. But that is an event which may well occur so early within the four months' period first mentioned in subsection (1) that the period of one month mentioned in paragraph (a) of subsection (2) may expire before the expiration of the period of four months first mentioned in subsection (1). It follows, therefore, that the only satisfactory way in which to construe the phrase in question in subsection (1) is as a phrase which describes a maximum period during any moment of which the event contemplated may occur. On any view, it is hardly possible to regard section 209 of the Companies Act, 1948, as entirely satisfactory in its language. On the view which I favour, for example, it is difficult to see why the right of the transferee company to serve notice to acquire the shares of a dissentient shareholder in the transferor company is postponed till the expiration of the four months period; but in view of the considerations which I have discussed, it appears to me impossible to treat that postponement as decisive of the construction of the phrase "within four months after the making of the offer" in subsection (1) of section 209. Further, those considerations appear to me, when construing section 209, as opposed to section 124 of the Canadian Companies Act, 1934, to prevent the introduction of the implied intention which Locke J. attributed to the Canadian Parliament.

In the result, I hold that the present case is distinguishable from *Rathie v. Montreal Trust Co.*¹⁵; that the phrase in section 209 (1) of the Companies Act, 1948, "within four months of the making of the offer" describes a maximum period within

¹⁵ [1953] 2 S.C.R. 204; 4 D.L.R. 289.

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which the event contemplated may occur; that it was competent to the respondents to fix a period within but shorter than the four months, during which the offer must be accepted, and, therefore, that the notice to the applicant was a valid notice.

I turn, therefore, to consider the submissions on behalf of the applicant as to the offer made by the respondents, the terms of which are set out in the circular of February 11, 1955. In approaching this question I have the guidance of what Maugham J. said in the course of his judgment in *In re Hoare & Co. Ltd.*,¹⁶ which involved an application under section 155 of the Companies Act, 1929. He is reported as saying¹⁷: “I “have some hesitation in expressing my view as to when the “court should think fit to order otherwise. I think, however, “the view of the legislature is that where not less than nine- “tenths of the shareholders in the transferor company approve “the scheme or accept the offer prima facie, at any rate, the “offer must be taken to be a proper one, and in default of an “application by the dissenting shareholders, which includes those “who do not assent, the shares of the dissentients may be “acquired on the original terms by the transferee company. “Accordingly, I think it is manifest that the reasons for inducing “the court to ‘order otherwise’ are reasons which must be “supplied by the dissentients who take the step of making an “application to the court, and that the onus is on them of “giving a reason why their shares should not be acquired by the “transferee company.

“One conclusion which I draw from that fact is that the mere “circumstance that the sale or exchange is compulsory is one “which ought not to influence the court. It has been called an “expropriation, but I do not regard that phrase as being very “apt in the circumstances of the case. The other conclusion I “draw is this, that again prima facie the court ought to regard “the scheme as a fair one inasmuch as it seems to me impossible “to suppose that the court, in the absence of very strong “grounds, is to be entitled to set up its own view of the fairness “of the scheme in opposition to so very large a majority of the “shareholders who are concerned. Accordingly, without express- “ing a final opinion on the matter, because there may be special “circumstances in special cases, I am unable to see that I have “any right to order otherwise in such a case as I have before “me, unless it is affirmatively established that, notwithstanding “the views of a very large majority of shareholders the scheme

¹⁶ 150 L.T. 374.

¹⁷ Ibid. 375.

"is unfair. There may be other grounds, but I see no other grounds available in the present case for the interference of the court."

Later his Lordship said ¹⁸: "It is further to be observed that the directors of the company, who hold, as I understand it, almost half the share capital in Hoare & Co. Ltd., accepted the Charrington offer, and the director who has made an affidavit, Mr. Arthur Lawford Wigan, himself accepted the offer in respect of his total holding of 10,550 shares in the company, and he expresses the opinion that the offer was a fair one and that there is no unfairness or hardship in the matter."

[His Lordship then considered the grounds on which the applicant based his dissatisfaction with the terms of the offer, and considered also the facts and the evidence, and held that the circular was consistent with, and fairly put forward, recommendations contained in a report dated November 17, 1954, made by the Hon. Thomas Brand, a director of Lazard, Brothers and Co. Ltd., and showing the basis on which Lazard, Brothers and Co. Ltd. would recommend a merger of interests of the two companies. His Lordship continued:] It remains to deal with one last point. There is a paragraph in the circular which reads thus: "The middle market quotation on the Stock Exchange, London, for the shares of Adamant on the day prior to the announcement of the proposed amalgamation was 25s. The middle market quotation for the shares of your company on the same day was 10s. 9d. On February 3, 1955, the quotations were 27s. 6d. and 13s. 3d. respectively."

It is agreed that on the basis of the middle market quotation there would be a paper profit to shareholders of the company of 1s. 9d. per share. But according to the evidence, if reference be made to the markings for shares in the company on December 9, 1954, the day before the announcement, the paper profit is reduced to 1s. 4d. Therefore, it is said that it was misleading to take the middle market quotation.

The middle market quotation was the middle price between 24s. and 26s., the prices between which the jobbers were prepared to do business. The markings represent dealings appearing in the Stock Exchange Daily Official List, which the jobbers or brokers concerned recorded. They are not, however, bound so to record their dealings. The test of the price of share markings affords an incomplete, and very possibly misleading, guide. In the case,

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¹⁸ 150 L.T. 374, 375.

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however, of the middle market quotation, a much sounder guide is afforded, particularly when an estimate of the value of shares on two different dates is desired to be made. There may, of course, be circumstances in which the middle market quotation may not be a satisfactory guide; but no such circumstances were shown to exist in this case, and in my view in their absence the middle market quotation should be taken as the reliable guide in preference to markings.

For these reasons, I dismiss this summons.

Summons dismissed.

Solicitors: *Daybell Watts-Jones & Co.; Slaughter & May.*

K. R. A. H.

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Jan. 25, 26;
Feb. 21.

Lord
Evershed M.R.,
Birkett and
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In re BARBOUR'S POLICIES OF ASSURANCE.
WESTMINSTER BANK LTD. v. INLAND REVENUE
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[1955 B. No. 1317.]

Revenue—Estate duty—Property chargeable—Property deemed to pass—Settlement of assurance policies and cash—Cash invested under settlement—Tenant for life entitled to income from investments after specified period—Death of settlor nine years later—Claim for estate duty on life interest in policies—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

Settlement—Interest in expectancy—Policy of assurance.

By a settlement made in 1929, a settlor assigned to the bank on trusts declared in the settlement two policies of insurance on his life. One of the policies was fully paid at the date of the settlement and the other by the time when the settlor died. The settlor also paid to the bank £12,000 in cash on trust.

Clause 2 of the settlement provided: "The bank shall out of the proceeds of the . . . policies pay all death duties if any leviable at the death of the settlor in respect thereof . . . and shall invest the residue of the said moneys and shall forthwith invest the said sum of £12,000 (which moneys and the property for the time being representing the same and the accumulations of the income thereof . . . are hereinafter called 'the trust fund') in the name of the bank" in investments mentioned in the settlement. Clause 3 directed the bank to accumulate the income of the trust fund until June 30, 1942.

Clause 4 provided that after that date the bank should "pay the income of the trust fund and the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof however not to be treated as income-bearing until the amounts payable in respect thereof shall have been received and invested) . . ." in the events which happened to the settlor's nephew J. B. for his life. The income of the trust fund was accordingly paid to J. B. from June 30, 1942.

The settlor died in 1951 and bonds and cash amounting to £19,753 2s. were received by the bank in satisfaction of the two policies; and the Crown claimed estate duty under section 2 (1) (d) of the Finance Act, 1894, on the life interest of J. B. in that sum. The Crown contended that, under the terms of the settlement, the life interest of J. B. did not fall into possession until the settlor's death:—

Held (Romer L.J. dissenting), that the relevant interest of the life tenant, J. B., under the settlement was liable to duty on the death of the settlor, under section 2 (1) (d) of the Finance Act, 1894, for on the happening of that event, J. B. acquired new rights in the "property" provided by the settlor (that is the policies and the contractual rights comprised in them) which he did not before possess. Until the settlor died, the life tenant's interest was an interest in expectancy only (subject only to his right to immediate receipt of the income of any proceeds of the policies received during the lifetime of the settlor). His interest was dependent on his surviving the settlor. On the death of the settlor there accrued to J. B. for the first time a beneficial interest in possession, that is, the right to the present enjoyment of the income.

D'Avigdor-Goldsmid v. Inland Revenue Commissioners [1953] A.C. 347; [1953] 1 All E.R. 403 distinguished.

Decision of Harman J., ante, p. 53; [1955] 3 All E.R. 41 reversed.

APPEAL from Harman J.¹

By a voluntary settlement dated March 5, 1929, and made between the settlor, Sir John Milne Barbour, of the one part, and the Westminster Bank Ltd. of the other part, the settlor paid to the bank, as trustees, the sum of £12,000 in cash, and assigned to them four policies of assurance on his own life. The settlor was at all material times domiciled in Northern Ireland, but the two of the four life policies in question were, at the settlor's death in October, 1951, locally situated in England, and estate duty, if payable upon them, was payable in England and not only in Northern Ireland, which was the case with the rest of the settled property. Both of the policies in question were made with the Scottish Amicable Life Assurance Society. One of the policies was dated September 12, 1928. In that policy

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¹ Ante 53; [1955] 3 All E.R. 41.

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the insurers promised, in consideration of a single premium already paid at the date of the settlement, to pay to the executors, administrators and assigns of the settlor the sum of £7,000 with profits on the settlor's death. In the other policy, which was dated July 16, 1919, in consideration of annual premiums payable during a period which had expired at the date of the settlement, the insurers covenanted on the settlor's death to pay or transfer to his executors, administrators and assigns two specified four per cent. Victory Bonds of £5,000 each; and the policy further provided that, in the event of either of the bonds being drawn for redemption during the currency of the policy (as happened, in fact, in the case of one of them), the assured or his assigns should (in effect) be then paid 15 per cent. of the amount of the bond and that the balance of 85 per cent. thereof should be paid on the settlor's death to his executors, administrators and assigns. The sum received by the bank when the Victory Bond was drawn during the settlor's lifetime was invested by them and the interest produced was at the date when the settlor died being paid to the life tenant under the settlement.

Clause 1 of the settlement operated to transfer to the bank "all those four several policies of assurance . . . and all moneys "to become payable thereunder and the full benefit thereof to "hold the same unto the bank upon the trusts and subject to "the powers and provisions hereinafter declared and contained "concerning the same."

By clause 2 it was provided that the bank should "out of the "proceeds of the said "policies pay all death duties leviable at the death of the settlor in respect thereof and all costs and expenses in connexion with the receipt of the proceeds of the policies, and should invest "the residue of the said moneys and "shall forthwith invest the said sum of £12,000 (which moneys "and the property for the time being representing the same and "the accumulations of the income thereof hereinafter directed "to be made are hereinafter called 'the trust fund') "in the manner therein specified.

Clause 3 provided for accumulation of the entire income of "the trust fund "until June 30, 1942.

By clause 4 the bank were directed, from and after June 30, 1942, to pay the income of "the trust fund "and all accumulations thereof " (the said policies and the proceeds thereof how- "ever not to be treated as income-bearing until the amounts "payable in respect thereof shall have been received and "invested) "to the settlor's son John during his life.

By clauses 5, 6 and 7, the bank were directed to hold the capital and future income of the trust fund and the accumulations after the death of the settlor's son John in trust for his sons. Clause 8 provided that on failure of those trusts the settlor's nephew James Barbour and his issue were to take corresponding interests, and clause 9 provided that on failure of that trust there should be similar trusts in favour of a nephew, John Doherty Barbour, and his issue, and there were divers remainders over.

The settlor's son John predeceased him in 1937, without issue and before the end of the period of accumulation. In and since 1942, when the accumulation period ended, the income of the trust fund had been paid to the settlor's nephew James. He had at present no issue. John Doherty Barbour was living and had issue two sons, one of whom had attained 21. On the death of the settlor in October, 1951, Victory Bonds and cash to the value of £19,753 2s. were received by the bank in satisfaction of these two policies.

The Crown contended that, on the death of the settlor, estate duty became payable on the life interest of James Barbour in the money or property assured by the above-mentioned policies of assurance under section 2 (1) (d) of the Finance Act, 1894,² or otherwise. Their claim was founded on the contention that under the terms of the settlement a beneficial interest in the settled property (with the exception of the sum received on the drawing of the one Victory Bond during the settlor's lifetime) arose or accrued to James Barbour for the first time on the death of the settlor.

Harman J. held that the interest of the life tenant James Barbour in the policies was, on the true construction of the settlement, a true life interest in possession and that, accordingly, estate duty was not exigible in respect of it on the death of the settlor. The Crown appealed.

John Pennycuik Q.C. and *E. Blanshard Stamp* for the Crown. *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*³ shows that the pertinent questions in deciding whether there is liability

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² Finance Act, 1894, s. 2 (1):
 "Property passing on the death of the
 "deceased shall be deemed to include
 "the property following, that is to
 "say:— . . . (d) Any annuity or other
 "interest purchased or provided by
 "the deceased, either by himself alone
 "or in concert or by arrangement
 "with any other person, to the extent
 "of the beneficial interest accruing or
 "arising by survivorship or otherwise
 "on the death of the deceased . . ."

³ [1953] A.C. 347; [1953] 1 All
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to duty under section 2 (1) (d) of the Finance Act, 1894, are, first, whether the deceased provided an interest, that is, an item of property, land, investments or the benefits of a contract. If he did not, the section does not apply. If, as in the present case, he did provide such an interest—a contract of insurance being within the scope of “other interest” in section 2 (1) (d)—the second question arises, namely, whether some new beneficial interest in the item of property provided by the deceased accrued or arose to a beneficiary on the death. “Accrued” in section 2 (1) (d) means taking a beneficial interest in possession. The section is, of course, only concerned with beneficial interests, and in the present case the trustees had the entire legal interest. Where there is an absolute gift of the item of property, as in the *D'Avigdor-Goldsmid* case,³ and the donee gets absolute ownership of the property as from the date of the gift, no new interest would accrue or arise on the death and there would be no liability under the section in such a case. In the *D'Avigdor-Goldsmid* case³ the donee could not enjoy the policy while the donor was alive, but he had the effective ownership and dominion over it during the donor's lifetime and could have dealt with the contract of insurance by selling or surrendering it. It was quite immaterial that the property provided by the deceased had increased in value on the death. The present case is distinguishable, for the piece of property provided by the deceased—the policies of insurance—has been settled on terms under which an interest arises or accrues on the death, a change which is quite different from a mere increase in value taking place on the death. During the lifetime of the settlor the life tenant, James Barbour, had a contingent interest in expectancy only. On the death he took a new interest, namely, an interest in possession in the subject-matter of the settlement. For the purpose of assessing duty the value of that new interest has to be ascertained without regard to the value of the interest in expectancy which the beneficiary had had until the death: see section 28 of the Finance Act, 1934, which in this respect has overruled *Adamson v. Attorney-General*.⁴

[ROMER L.J. The life tenant became entitled to the income of part of these funds during the lifetime of the settlor. Does not that show that his interest was not contingent?]

The test is not whether the interest was vested or contingent before the settlor died, but whether it was expectant or in possession. It was contingent in the sense that the individual concerned

³ [1953] A.C. 347.

⁴ [1933] A.C. 257; 49 T.L.R. 169.

could only take in possession if he was alive at the date when the interest fell into possession. In that sense any future interest is contingent. Until the event happened the beneficiary had a life interest in expectancy.

There is no difficulty in the concept of a trust under which a beneficiary takes an interest in possession in one asset of the trust fund at one time and in another asset at another time. James Barbour took an interest in possession in the investments when the period for accumulation ended in 1942, but he only took an interest in possession in the policy moneys on the death of the settlor.

If, however, it should be held that the life tenant took an interest in possession on the execution of the settlement, it would follow that, if he had happened to predecease the settlor, duty would have been chargeable under section 1.

The terms of this settlement provided a set of rights which are entirely different from those of the donee in the *D'Avigdor-Goldsmid* case.⁵ In the present case James Barbour had at no time dominion over the policy itself but only rights to the proceeds, and those proceeds could only come into operation on the death of the settlor. During the lifetime of the settlor he could not have called on the trustees to deal with the policies in any way, nor had he any rights against the insurance companies. He could require that the trustees should retain the policies intact, that they should take any steps which were needed to ensure that his future interest was not put in jeopardy, but he had no interest in possession and could not compel the trustees to make any available to him. If either policy had been surrendered (though there was no express power in the settlement to do that), or if, for example, one of the insurance companies had gone into liquidation, it would have been the duty of the trustees to have applied the money paid to them by way of dividend either in taking out with another company a new fully paid policy on the life of the settlor, or if that was impossible, to have invested the moneys and to have accumulated the interest until the death of the settlor.

In determining whether section 2 (1) (d) applies, one must take the position as it is at the date when the settlor dies; it is impossible to take account of what some beneficiary might have done, with the co-operation of some other beneficiary during the lifetime of the settlor, if at the relevant date they have not done it.

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⁵ [1953] A.C. 347.

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Attorney-General v. Dobree,⁶ *prima facie*, covers this case and, although in some respects that case was wrongly decided, it has not been expressly overruled. It is, however, clear that the "other interest" provided by the deceased cannot, since the *D'Avigdor-Goldsmid* case,⁷ be the policy moneys.

It is not said that James Barbour had a defeasible interest until the death. He had only an interest in expectancy. If his interest had been defeasible, duty would have been chargeable on the death: *Attorney-General v. Lloyds Bank Ltd.*⁸ and *Adamson v. Attorney-General*.⁹

[ROMER L.J. In *Attorney-General v. Lloyds Bank Ltd.*¹⁰ the point was conceded.]

*Westminster Bank Ltd. v. Attorney-General*¹¹ was a case of settled policies but, as in *Attorney-General v. Lloyds Bank Ltd.*,¹² there were admissions which make the decision of little assistance. Further, that decision would seem to require re-examination in the light of the *D'Avigdor-Goldsmid* case¹³ on the basis that the interest provided was the contract of insurance and not the policy moneys.

[LORD EVERSHERD M.R. With the possible exception of the Scottish cases all these earlier cases ought to be re-examined in the light of the *D'Avigdor-Goldsmid* case.¹³]

The declaration of trusts in *Lord Advocate v. Hamilton's Trustees*¹⁴ was apparently in the *Lassence v. Tierney*¹⁵ form. At the settlor's death the daughter had only a life interest, for there were children to take, but the difference between her interest and that of the sons appears to have been overlooked in the judgments. In the *D'Avigdor-Goldsmid* case¹⁶ Lord Morton only approved that part of the judgment which related to the interests of the sons. It is open to question whether, having regard to *Attorney-General v. Lloyds Bank Ltd.*,¹⁷ the decision is right in so far as the daughter's interest was concerned. But that question does not arise here. The beneficial interest in question here is the contract for the payment of a sum of money in a future event; on the happening of that event the beneficial interest is transmuted into a sum of money payable under the contract. The property provided is the policies of insurance. It

⁶ [1900] 1 Q.B. 442; 16 T.L.R. 80.

⁷ [1953] A.C. 347.

⁸ [1935] A.C. 382.

⁹ [1933] A.C. 257.

¹⁰ [1935] A.C. 382.

¹¹ [1939] Ch. 610; [1939] 2 All E.R. 72.

¹² [1935] A.C. 382.

¹³ [1953] A.C. 347.

¹⁴ 1942 S.C. 426.

¹⁵ (1849) 1 Mac. & G. 551.

¹⁶ [1953] A.C. 347.

¹⁷ [1935] A.C. 382.

is the benefit of the obligations to pay the money in the future and it would comprise those moneys when and if they came to be paid: *Tennant v. Lord Advocate*.¹⁸ [Reference was also made to *Hill v. Trenery*,¹⁹ *Kingdon v. Castleman*²⁰ and *In re Lingard*,²¹ which were cases where the settled property for various reasons had ceased to exist in the form in which it was settled.]

Geoffrey Cross Q.C. and *J. A. Wolfe* for the Westminster Bank Ltd. Some of the earlier cases seem at first sight to favour the view that duty is payable in respect of the life interest, but they cannot be regarded as authoritative since the *D'Avigdor-Goldsmid* case²² and are of little assistance. The question in *Attorney-General v. Dobree*²³ was very similar to that raised here but, as Lord Morton pointed out in the *D'Avigdor-Goldsmid* case,²⁴ *Attorney-General v. Dobree*²⁵ proceeded on a wrong view of what was the relevant interest provided by the settlor. In *Lord Advocate v. Hamilton's Trustees*²⁶ the settlor's daughter had, unlike her brothers, a life interest only, but, as Harman J. pointed out,²⁷ that distinction was apparently overlooked in the judgments. Lord Morton clearly approved²⁸ the reasoning in *Lord Advocate v. Hamilton's Trustees*,²⁹ but it is only appropriate to the absolute interests of the sons, and the daughter's interest appears to have been included per incuriam.

The *D'Avigdor-Goldsmid* case³⁰ shows that there is a vital distinction between a contract of insurance as a whole (which, applying the metaphor of Lord Asquith of Bishopstone in the *D'Avigdor-Goldsmid* case,³⁰ can be regarded as the "tree") and what becomes payable under that contract (that is the "fruit" of the "tree"). For the purpose of section 2 (1) (d) the interest provided is the "tree." The accrual of the "fruit" from time to time gives rise, no doubt, to a beneficial interest but not to one which entails any liability to duty, for it is not a new beneficial interest in the contract itself but the fruition of the interest already held: see *per* Lord Porter in the *D'Avigdor-Goldsmid* case.³¹ "Interest in possession" in section 2 (1) (d) means a present right to receive any income which the subject-matter provided by the deceased in fact produces; it is not essential to

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¹⁸ [1939] A.C. 207; 55 T.L.R. 472;
[1939] 1 All E.R. 672.

¹⁹ (1856) 23 Beav. 16.

²⁰ (1877) 46 L.J.Ch. 448.

²¹ [1908] W.N. 107.

²² [1953] A.C. 347.

²³ [1900] 1 Q.B. 442.

²⁴ [1953] A.C. 347, 368.

²⁵ [1900] 1 Q.B. 442.

²⁶ 1942 S.C. 426.

²⁷ [1956] Ch. 53, 67.

²⁸ [1953] A.C. 347, 374.

²⁹ 1942 S.C. 426.

³⁰ [1953] A.C. 347, 378.

³¹ *Ibid.* 364.

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the existence of an interest in possession that that subject-matter should produce any income, or be capable of producing any. For example, if there was a settlement of worthless shares and the trustees were directed to retain the investment and not to realize it, the life tenant might get nothing at all but he might nevertheless have an interest in possession.

In the present case the subject-matter provided by the deceased did in fact yield some income during the lifetime of the settlor. That income went to the life tenant, pursuant to the terms of the settlement, and that shows that he must have had then an interest in possession which entitled him to receive any income which was in fact produced by the subject-matter provided by the settlor.

[ROMER L.J. The legal right in the "tree" remained in the trustees throughout the settlor's lifetime and the tenant for life does not seem to have had any interest in the "tree," for the right to insist that the trustees should preserve his right to future proceeds (that is to cultivate the "tree" properly) is not, strictly speaking, a right in the contract at all.]

[LORD EVERSHERD M.R. If James Barbour had a present beneficial interest in the contract as from the date of the settlement, what was the position when the settlor's son, John, died in 1937, for on that footing he must have had a life interest in the "tree"?)

The policy itself would have passed on his death under section 1 of the Act. If a life policy is held on trust for "A for life with "remainder to B," one view is that A has a life interest in the policy and, if so, that is an interest in possession. It follows that on the death of the life tenant that interest would pass. On the other hand, it may be that the life tenant has not really any interest in the policy at all, that his only interest is in the proceeds as and when they come in, some during the settlor's lifetime and some at his death, with the right to see that the trustees carry out their trust. That would be a beneficial right in relation to the trust fund which could not alter in character at all at the death of the settlor. If that is the true view, nothing passed on the death of John in 1937. He had no interest in the policies themselves, except to the limited extent that he could require the trustees to fulfil their obligations. The cesser of that right on his death could not be a passing of the "property."

[LORD EVERSHERD M.R. But would it not follow that that would not be the same right as that which the life tenant got after the settlor's death?]

The position after the death is the same in substance as when the Victory Bond was redeemed. It is not disputed that in the ordinary use of language when the "fruit" comes in and is invested and someone gets the income, that beneficiary may be said to be getting an interest which he did not previously have, but, as Lord Porter said,³² that is not an interest in the "tree." It cannot be shown that there was here on the settlor's death any relevant change of interest in the contract as a whole, in so far as the tenant for life had any interest in it.

[ROMER L.J. The beneficiary admittedly had an interest in the proceeds of the policies when they were received. If those proceeds are not within the scope of the definition of "other interest," section 2 (1) (d) does not apply. But where the policies are fully paid up would not the true view be that the "other interest" means the policy as defined, together with the policy moneys when paid, for in those circumstances they are also properly to be regarded as having been provided by the settlor?]

If the policy moneys when received are to be regarded as provided by the settlor, then the interest does not spring up on the death, but according to the *D'Avigdor-Goldsmid* case³³ that does not seem to be the property provided by the settlor.

[LORD EVERSHED M.R. If Lord Porter in the *D'Avigdor-Goldsmid* case³⁴ was laying down a general proposition that the beneficiary could not be said to acquire any interest in a policy, when after the death of the assured he became entitled to enjoy the income of the policy moneys when invested, that would end the matter.]

[ROMER L.J. Lord Porter appears to have been comparing the position before and after the death of the settlor where the donee was absolutely entitled.]

No new interest accrued on the death of the assured so far as the trustees were concerned, yet it is said that a new beneficial interest in the policy accrued to a beneficiary under the trust fund, and that seems impossible.

It is evident that the draftsman thought that the life tenant would have an interest in possession during the lifetime of the settlor, for clause 4 is otiose except on that assumption. The draftsman evidently feared that if clause 4 were not inserted, on the falling in of the policy the life tenant could have claimed the

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³² [1953] A.C. 347, 364.

³⁴ Ibid. 364.

³³ [1953] A.C. 347.

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income under *Rowlls v. Bebb*,³⁵ but he could not have made such a claim unless he had had a life interest in possession.

There are, apparently, two alternative approaches to this type of gift. First, it may be said that there was a gift of a beneficial interest to the life tenant in the policy itself which, as the receipt of the income shows, must have been an interest in possession during the assured's lifetime. Alternatively, if the gift was of the fruits derived from the contract from time to time and invested by the trustees, no beneficial interest in what was provided by the deceased arose on the death, because the only interest which the beneficiary had in the contract was to see that it was properly carried out and that interest did not change on the death. If that was the interest, then the life interest in what came in on the death is not an accrual of a new life interest within the *D'Avigdor-Goldsmid* case.³⁶

The *D'Avigdor-Goldsmid* case³⁶ decided that if there was a single beneficial owner of property comprising a life assurance policy, and on the death of the settlor he merely got an increase of the value of his interest, that would not give rise to a new interest in the policy. If there were two tenants in common of a policy they could dispose of the whole policy and no new beneficial interest could be said to have accrued to them, viewed together, on the death. If one beneficiary is a tenant for life and the other is entitled in remainder, viewed together no new interest can accrue to them together, and it is difficult to see how a new interest in the policy could be said to accrue to the tenant for life by himself.

[LORD EVERSHERD M.R. In the *D'Avigdor-Goldsmid* case³⁶ the tenant for life was absolutely entitled in 1934—that was the circumstance with which they were dealing. Lord Porter said³⁷ that he did not get any new interest and that was enough for the decision. It looks as though the previous sentence went further than was required and was deciding something which Lord Morton expressly abstained from deciding.³⁸]

The life tenant was given the "proceeds" of the policies and that, by the terms of the settlement, included anything coming under the contract, thus including moneys payable while the settlor was still alive.

[The argument that a policy of insurance is outside the scope of the formula in section 2 (1) (d), "any annuity or other

³⁵ [1900] 2 Ch. 107.

³⁶ [1953] A.C. 347.

³⁷ *Ibid.* 364.

³⁸ *Ibid.* 368.

“interest,” is not open in the light of *Attorney-General v. Murray*³⁹ but is reserved if the case should go to the House of Lords.]

J. A. Wolfe following. As the policies were fully paid the interest provided by the deceased contained within itself as from the date of the gift the certainty that it would be converted into money when the policies matured. Consequently there was no change which attracted duty under section 2 (1) (d), and no new interest was created when that happened.

[ROMER L.J. On the construction of the settlement the life interest which was given was confined to the right to enjoy the income of the fund for life and had nothing to do with the contractual rights subsisting between the settlor and the companies.]

The gift was of the right to enjoy any fruits, as and when they might become available, whether before or after the settlor died, subject only to the provision for accumulation.

[ROMER L.J. That cannot be described as a life interest in the “bundle of rights.” Only the trustees had that.]

There is no valid distinction between a life interest in the rights and a life interest in the fruits of enforcing those rights. A gift of the latter would include a gift of the former. The tenant for life was entitled to such enjoyment as was possible of the property provided. When the policies fructified his enjoyment became keener.

Pennycuik Q.C. in reply. The metaphor of the “tree” and “fruit” is best avoided here; it is usually applied to questions of what is capital and what is income; here the question concerns the contract of insurance and what is payable under it. The suggestion that the gift was of the benefit of an obligation to pay a sum of money on the happening of an inevitable future event and that, therefore, there was no change when the death occurred, if correct, would have provided a short and conclusive answer in the *D’Avigdor-Goldsmid* case,⁴⁰ but there is not the faintest indication of it in that case. The burden of that judgment was that, although the settlor had, admittedly, provided a contract which became policy moneys at his death, no beneficial interest had, on the facts, arisen in those moneys on his death because the donee had previously to the death been the absolute owner. Lord Porter’s remarks⁴¹ are founded on that circumstance and have no bearing here. In the present case the property provided

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³⁹ [1904] 1 K.B. 165; 20 T.L.R. 137.

⁴⁰ [1953] A.C. 347.

⁴¹ *Ibid.* 364.

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by the deceased was the policy but, apart from the investments, the interest of the life tenant was conferred by reference only to the proceeds of the policies. From its very nature that interest was in expectancy until the proceeds came into existence.

Cur. adv. vult.

The following judgments were read.

February 21. LORD EVERSHERD M.R. The question raised in this appeal is whether estate duty is chargeable under section 2 (1) (d) of the Finance Act, 1894, in respect of the interest under a voluntary settlement, of a person entitled for his life, upon the death of the settlor, to the income of the proceeds of certain fully paid policies of life insurance on the settlor's life.

[His Lordship stated the facts set out above, read section 2 (1) of the Finance Act, 1894, and continued:] It was, and is, the contention of the Crown that the requirements of section 2 (1) (d) of the Finance Act, 1894, are here satisfied because, (1) the two policies constitute "property" provided by the settlor, and (2) upon the death of the settlor there arose or accrued for the first time to James Barbour a beneficial interest in that property, namely, a present right to the enjoyment of the income of the proceeds of those policies which were then received or of the investments representing the same, Mr. Barbour's interest in the "property" prior to the settlor's death having been (subject to the one qualification hereafter mentioned) a mere interest in expectancy in the income of the proceeds dependent on his survivorship of the settlor, and not giving to him in the meantime any interest in possession in the policies themselves. The qualification which I have mentioned is related to the fact that one of the Victory Bonds had been drawn for redemption in the year 1937, so that the bank then received in respect of it the sum of £750. The bank then became bound to invest that sum, and, after the expiry of the period of accumulation in 1942, bound to pay the income of that sum and of its accumulations immediately to Mr. James Barbour. It follows, and the Crown have not contended to the contrary, that in the event no beneficial interest in such sum arose or accrued to Mr. James Barbour upon the settlor's death. His interest in the sum was the same immediately thereafter as it had been before. It is to be observed, however, that there was by the terms of the settlement no power in the bank to surrender the policies or otherwise

to deal with them during the settlor's life nor any power to put the life tenant into possession of the policies so as to allow him to surrender or otherwise deal with them.

The question which now arises was expressly reserved by the House of Lords in *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*,¹ and particularly by Lord Morton of Henryton in his speech in that case.² Briefly, the facts in that case were that, as a result of a settlement, a resettlement and a joint appointment, the policy there referred to, together with settled freehold premises, became during the settlor's life (and more than five years before his death) the absolute beneficial property of the appellant, the settlor's son. The premiums under the policy continued in fact to be payable after the appointment took effect and were paid by the son; but nothing for present purposes turns upon those circumstances. In this court the view had been taken, following a decision of Palles C.B. in *Attorney-General v. Robinson*,³ that estate duty was properly leviable under section 2 (1) (d) of the Finance Act, 1894, on the footing that a beneficial interest accrued or arose for the first time to the appellant upon the settlor's death, being the beneficial interest which then was realized for him by the maturity of the policy and the payment to him of the policy moneys. The House of Lords reversed the decision of this court and expressly disapproved the reasoning of Palles C.B. in the Irish case. The conclusion of the House of Lords can conveniently be summarized by one citation from the speech of Viscount Simon⁴: "A life policy is a piece of property which confers upon the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid the policy moneys on the death of the person whose life is assured. These rights therefore belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realized. There was therefore no new or additional beneficial interest in the policy which arose on the death of the appellant's father. For six years past, he had had absolute and unfettered ownership of the policy. As Vaisey J. pointed out he 'could have sold it, mortgaged it, given it away, destroyed it, settled it, or' (being a policy on his father's life) he could have surrendered

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¹ [1953] A.C. 347; [1953] 1 All
E.R. 403.

² [1953] A.C. 347, 368.

³ [1901] 2 I.R. 67.

⁴ [1953] A.C. 347, 361.

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“ ‘ it at the moment when his father was at the point of death.’
“ If he had done any of these things, the Crown could not have
“ claimed to aggregate the policy moneys with the rest of the
“ estate for the purposes of duty. It follows that no estate duty
“ is payable on the ” (proceeds of the policy) “ for no beneficial
“ interest in the policy accrued or arose on the death of the
“ deceased.”

It will be necessary for me to examine closely the other speeches in the House in order to see how far the reasoning of them extends; in particular, whether, as the respondents here claim, it extends so as to cover the facts now before this court. For the case of the respondents was, and is, in substance this, that *D'Avigdor-Goldsmid v. Inland Revenue Commissioners* ⁵ inevitably carries with it a conclusion favourable to the respondents. It is said on their behalf (and the argument appealed to Harman J.) that the effect of the decision in the House of Lords is that the first and any succeeding life tenant under the terms of the settlement during the settlor's life was entitled in possession, albeit for a limited interest, to the policies, that is to the contractual rights or the “ bundles of rights ” constituted thereby, and that this is none the less so, although until the proceeds of the policy or some proceeds of the policy were received by the bank such life tenant had no actual enjoyment of any present benefit.

Reference was made before Harman J. and in this court to a number of cases also cited in *D'Avigdor-Goldsmid v. Inland Revenue Commissioners* ⁵ in the House of Lords. There is, I think, little doubt (and Mr. Cross was disposed so to concede) that before the decision in the *D'Avigdor-Goldsmid* case ⁵ the answer to the present question would, on the authority of the earlier cases, have been in favour of the Crown. But it was also before us agreed by Mr. Cross and Mr. Pennycuik that the *D'Avigdor-Goldsmid* case ⁵ had called for a reassessment of the older law. In truth, in my judgment, the earlier cases to which I have referred no longer form for us a clear guide: the question is now one of principle to be determined in accordance with the proper construction of the well-known subsection of the Finance Act, 1894, but in the light of the citations in the *D'Avigdor-Goldsmid* case. ⁵

Thus, in *Attorney-General v. Dobree*, ⁶ the question raised being substantially the same as that now before us, the decision of the Divisional Court was in favour of the Attorney-General.

⁵ [1953] A.C. 347.

⁶ [1900] 1 Q.B. 442; 16 T.L.R. 80.

Lord Morton of Henryton, though expressly reserving the question now raised and determined in *Dobree's* case,⁶ nevertheless pointed out⁷ that the decision in the latter case must be taken to have been erroneous in so far as it decided that duty was leviable, not upon the value of the life interest which took practical effect on the death of the assured, but on the whole value of the policy; and also in so far as Darling and Channell JJ. found that the "other interest" provided by the deceased was not the policy but the sum paid in respect thereof on the settlor's death.

In others of these cases, for example, *Inland Revenue Commissioners v. Scott's Trustees*,⁸ *Tennant v. Lord Advocate*,⁹ and *Westminster Bank Ltd. v. Attorney-General*,¹⁰ the point now in question was not, or was not primarily, at issue, and was either conceded or regarded as covered by previous decisions; and, as Lord Morton of Henryton pointed out,¹¹ these cases again can no longer be regarded as authorities in so far as they proceeded on the view that the interest provided by the settlor was the policy moneys and not the policy itself.

In the Scottish case of *Lord Advocate v. Hamilton's Trustees*¹² a settlor had settled life policies on his own life in favour of his sons and his daughter, the interest of the daughter (unlike the interests of the sons) being limited for her life only. The Inner House rejected a claim for duty; but, so far as the report seems to show, on the single ground that the sons' interests were absolutely vested immediately at the date of the settlement, and no notice appears to have been taken (as pointed out by Harman J.) of the different circumstances affecting the settlor's daughter.

These earlier cases being, therefore, in my judgment, no longer authoritative or of real assistance for the purposes of the present appeal, I ask myself, in order to discover whether (to use Viscount Simon's word¹³) the "quality" of Mr. James Barbour's rights was at all changed by his uncle's death, what those rights were under the settlement during the settlor's life.

According to the terms of the settlement itself the beneficial interest of James Barbour is limited to the income during his life of the "trust fund" and the investments representing the same, the trust fund being by virtue of the definition in clause 2

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⁶ [1900] 1 Q.B. 442.⁷ [1953] A.C. 347, 368.⁸ 1918 S.C. 720.⁹ [1939] A.C. 207; 55 T.L.R. 472;

[1939] 1 All E.R. 672.

¹⁰ [1939] Ch. 610; [1939] 2 All E.R. 72.¹¹ [1953] A.C. 347, 373.¹² 1942 S.C. 426.¹³ [1953] A.C. 347, 361.

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limited, as respects the policies, to the proceeds thereof and the property representing the same including the accumulation of income. Mr. Cross referred us to the parenthesis in clause 4 providing that "the said policies" and their proceeds were not to be treated as income-bearing until the sums payable in respect thereof had been received and invested. For present purposes I do not think that this provision is of significance. But it is clear, as I have earlier said, that the bank were given no power to surrender or otherwise realize the policies, still less to put a tenant for life in possession of them in the sense of transferring the legal title in them to him so as to enable him to deal therewith himself.

There was some discussion before us of the question what would happen if the insurance society were wound up and a sum of money paid to the bank in satisfaction of their contractual rights under the policies. In my judgment, it is sufficient to say that, in such an event or upon any other variation of the strict contract contained in the policies, after the expiration of the period of accumulation directed by the settlement, the right of a tenant for life to receive immediately the income of the invested sums paid to the bank would appear to depend on the question whether such sums could properly be described as "proceeds of the policies." If they could be so described, then no doubt, as in the event which happened of one or more of the Victory Bonds being drawn for redemption during the settlor's life, the right of the tenant for life to enjoyment of income would be pro tanto accelerated.

Subject, then, to the tenant for life's right to immediate receipt of the income of any proceeds of the policies received in the lifetime of the settlor, his rights as regards the policies during that period were, in my view, limited to a right, if necessary by application to the court, to require the bank to preserve and maintain the policies according to their terms, and no more. Upon the settlor's death he then had the right of requiring the bank to enforce the terms of the policies and collect and invest the proceeds, and thereafter (assuming that the accumulation period had expired) the further right to require the bank to pay to him the income of the resulting investments.

In my judgment, and treating the matter for the moment as *res integra*, the "quality" (again to use Viscount Simon's expression¹⁴) of the tenant for life's rights quoad the policies did undergo a change, and a change of substance, upon the

¹⁴ [1953] A.C. 347, 361.

settlor's death. Put otherwise, I think that upon the happening of that event the tenant for life acquired new or additional rights which he did not before possess. Expressed in the terms of section 2 (1) (d) of the Act, the property (or "other interest") provided by the settlor was the policies and the whole of the contractual rights comprised in the policies; those rights included the right upon the happening of a future event to receive the policy moneys; and upon that event there arose or accrued to the tenant for life, if he survived, for the first time a beneficial interest, namely, the right to the present enjoyment thereafter of the income.

I, therefore, for my part, agree with Mr. Pennycuick's analysis—and I am, of course, still treating the matter as ungoverned by authority—that (subject only to the event of one of the Victory Bonds being drawn for redemption as regards the specified part of the redemption moneys received by the bank, in which event his interest expectant on his being alive at the settlor's death would be pro tanto accelerated) the interest of the life tenant during the settlor's life was an interest in expectancy only and thereafter, if he survived the settlor, was an interest in possession.

I add that if this analysis is correct it appears not to be in doubt that section 2 (1) (d) is applicable, since the tenant for life's interest in the policy moneys is a beneficial interest in the policy itself (see *Tennant v. Lord Advocate*¹⁵), and also that (having regard to section 28 of the Finance Act, 1934) the duty is leviable upon the whole value of James Barbour's life interest at his uncle's death.

Having regard to the terms of the settlement which we have to construe, the case is, to my mind, essentially different from the case of a person presently entitled to the income of a block of shares or other fund which for one reason or another happens not at the time to be producing income—though I would add that any such comparison may be misleading unless the exact terms of the latter's rights are known and stated. On the other hand, if the respondents' contention is correct then it must follow—and Mr. Cross expressly so conceded—that if James Barbour had died in the settlor's lifetime after June 30, 1942, the policy itself would have passed on his death under section 1 of the Act of 1894—a result which seems to me, I confess, contrary to the common sense and reality of the matter.

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¹⁵ [1939] A.C. 207.

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It remains to consider whether the view which, if I am free to adopt it, commends itself to me is negatived by the speeches of the noble Lords in the *D'Avigdor-Goldsmid* case,¹⁶ which it is, of course, my duty loyally to follow. In my judgment, the decision of the House was based upon and limited to the proposition that, in the circumstances of the case before it, the appellant was at all material times both before and after the settlor's death absolute beneficial owner of the relevant policy together with all the rights and incidents attached thereto. So much clearly appears, as I think, from the extract which I have already made from the leading speech of Viscount Simon. So, also, does it appear from the report of the arguments. Thus, Mr. Tucker put his case for the appellant¹⁷: "The case of an annuity is different because a person in order to become entitled to it must survive whereas in the case of a lump sum to which he is absolutely entitled he need not survive, since if he dies it goes to his estate." So, also, Mr. Pascoe Hayward¹⁸: "... in section 2 (1) (d) the draftsman had in mind the type of case exemplified in *Adamson v. Attorney-General*,¹⁹ where there is a settlement or trust instrument under which the benefit can arise"; and after referring to the formula in section 28 of the Finance Act, 1934, "any interest in expectancy" he proceeded: "This is the first time in the reported cases that it has been sought to exact tax under section 2 (1) (d) when there was no trust instrument, in force at the death, under which the beneficial interest arose."

Lord Porter referred at the beginning of his speech²⁰ to the dissenting opinion of Lord Russell of Killowen in *Tennant v. Lord Advocate*²¹ and to the proposition there referred to by the noble Lord, which had been accepted by Palles C.B., that the "property" deemed to pass by virtue of section 2 (1) (d) "was the policy moneys, not the rights existent in the contract of insurance." "If it is accurate to say," continued Lord Porter,²² "that the interest which is aimed at in the subsection is the policy money when received and not the contract of insurance represented by the policy, there does spring up for the first time on the death of the assured an interest which then and then only arises or accrues, and the Crown's contention is right. But in my opinion Lord Russell's doubts are

¹⁶ [1953] A.C. 347.

¹⁷ *Ibid.* 352.

¹⁸ *Ibid.* 354.

¹⁹ [1933] A.C. 257; 49 T.L.R. 169.

²⁰ [1953] A.C. 347, 362.

²¹ [1939] A.C. 207, 210.

²² [1953] A.C. 347, 363.

"fully justified, and I cannot accept the view that some fresh interest accrues to or arises in the beneficial holder of a policy on the termination of the life insured." The last sentence which I have quoted appears to be one of wide import. But, in my judgment, by his use of the expression "the beneficial holder of the policy" the noble Lord was intending to confine himself to the case of one who, like the appellant before him, had become before the settlor's death absolute beneficial owner of the policy and all the rights incident thereto. "From the date of the assignment to him in 1934," continued Lord Porter in the very next sentence, "the appellant was the absolute owner of the policy and, subject to payment of the premium, entitled to receive the sum insured . . . when the stipulated time of payment . . . had been reached." Again, distinguishing *Adamson's* case²³ from the case before him, he said²⁴: "The case differs from the present one in which the rights of the appellant have not changed. He is and has been since 1934 full and absolute owner of the policy."

Lord Morton of Henryton, as I have already said, while criticizing in some respects the case of *Attorney-General v. Dobree*,²⁵ expressly left open the validity of the conclusion reached in that case and, therefore, the question raised in this. The ratio of his view in the case before him may be found in the statement²⁶: "The question to be decided is whether a beneficial interest in the policy accrued or arose on Sir Osmond's death. To that question there can, in my view, be only one answer. The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his father's death."

Lord Reid, after observing that the words "beneficial interest" were not synonymous with "financial benefit" and that for the Crown to succeed it must be shown that there accrued or arose on the relevant death "some right or property of a different kind from that previously enjoyed by the beneficiary," proceeded to point out²⁷: "In the present case the appellant was absolute and unfettered owner of the policy before Sir Osmond's death and he remained absolute and

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²³ [1933] A.C. 257.²⁴ [1953] A.C. 347, 365.²⁵ [1900] 1 Q.B. 442.²⁶ [1953] A.C. 347, 367.²⁷ *Ibid.* 375.

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“ unfettered owner after the death.” Then, after a refutation of the proposition that the property provided was not the policy but the money paid under it, he said ²⁸: “ It was then argued that, if what was provided was the policy, a new beneficial interest in respect of it arose at the death because then for the first time there arose a right to sue for the sum due under the policy: before the death the appellant only had a contingent future right, but after the death he had a new and different right—a right to get the money. This argument is not based on any peculiarity of a contract of insurance, and if it is right it seems to me necessarily to lead to the conclusion that, whenever a creditor is owed money payable at a future date, his right after the date of payment has come is a new right different from the right which he had before that date. That seems to me to be a novel doctrine and to neglect the fact that the rights of contracting parties flow from the contract: a new right would require a new contract. From the beginning the creditor’s right was to be paid on a certain day, and the coming of that day does not create a new right, it merely enables him to enforce his old right. And I do not see why it should make any difference if the date of payment is determined not by the calendar but by the occurrence of an event such as death, whose date cannot be predicted. Nor do I see why it should make any difference that the creditor has had to perform his part of the contract between the date when it was made and the date of payment. I must, therefore, also reject this argument.”

In my judgment the passage which I have quoted at length does not and was not intended to carry with it the conclusion that one who, by the terms of a settlement is entitled at the death of a person living, if he survives that event, to the income of the invested proceeds of a policy of insurance on such person’s life, is in the meantime also entitled to be treated or sensibly described as a life tenant of the contract of insurance. In my judgment, Lord Reid rejected the argument posed because the appellant was and had been at all relevant times the absolute beneficial owner of the policy in question and because survivorship of the life assured was irrelevant to his rights of ownership.

Lord Asquith of Bishopstone expressed his concurrence with the preceding opinions in brief but characteristically vivid language; and there was considerable reference before us to his final sentence.²⁹ “ If I buy an apple tree and it subsequently

²⁸ [1953] A.C. 347, 376.

²⁹ Ibid. 378.

"bears fruit, I am beneficially interested in the fruit from the "start." But it does not follow, in my judgment, that one who expects, if he so long survives, to enjoy the fruit or some of the fruit which a tree may hereafter bear has necessarily thereby an identity of interest in both the tree and its fruit. There was indeed, to my mind, force in Mr. Pennycuick's comment that we are not in the present case concerned with any of those questions of capital and income to which the metaphor of a tree and its fruit is more generally applied.

I therefore find in the speeches in the *D'Avigdor-Goldsmid* case³⁰ nothing which binds me to answer the question posed in this appeal in favour of the respondents. Being, as I think, free to decide the question according to principle and the true construction of the subsection, I have come to a conclusion, with all respect to the different view taken by Harman J. and also by my brother Romer, in favour of the Crown and think that the appeal should be allowed.

I should add that Mr. Cross has expressly reserved before us, as not being open to him in this court in light of the decision of *Attorney-General v. Murray*,³¹ the argument that a policy of insurance is in any event outside the scope of the formula in section 2 (1) (d) "any annuity or other interest."

BIRKETT L.J. The judgment of the Master of the Rolls leaves little to be said on the questions which arise on this appeal.

The main question which arises is whether estate duty is payable under section 2 (1) (d) of the Finance Act, 1894, upon the death of the settlor in respect of the beneficial interest under the voluntary settlement on the proceeds of two policies of insurance upon the settlor's life. The settlor was Sir John Milne Barbour, and in March, 1929, he assigned to the Westminster Bank Ltd. certain property including the two policies of insurance in question. One policy was dated July 16, 1919, and was fully paid in 1928. The other policy was dated September 12, 1928, and was a single premium policy.

The relevant clauses have already been read and need not be repeated. Sir John Milne Barbour died in October, 1951, and the Westminster Bank received the sum of £19,753 2s. in satisfaction of the two policies in question. By reason of the death of the settlor's son in 1937 and by the provisions of

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³⁰ [1953] A.C. 347.³¹ [1904] 1 K.B. 165; 20 T.L.R. 137.

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clause 8 of the deed it is the settlor's nephew, James Barbour, who takes the life interest in this sum, and it is on the life interest of James Barbour that the Crown claims the duty in this appeal.

The learned judge made the order in this case that having regard to the provisions of the settlement and in the events that have happened, estate duty did not become payable under section 2 (1) (d) of the Finance Act, 1894, in respect of the life interest of James Barbour in the policy moneys, and from that decision the Crown appeals.

The settlor was domiciled in Northern Ireland, but it was conceded that as the two policies in question were situated in England at the death of the settlor, and if estate duty was in fact payable upon the death of the settlor in respect of the two policies, the duty would be payable in England. The early correspondence between the solicitors for the Westminster Bank and the Estate Duty Office in Belfast made it plain that the Crown's advisers were contending that *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*³² did not relieve the bank from payment of estate duty under the section, as the bank contended.

Before Harman J., and in this court, the *D'Avigdor-Goldsmid* case³² and the many cases which were cited in the House of Lords were fully discussed, but in view of the judgment of the Master of the Rolls I can content myself by stating my own view as briefly as possible. In my view, the facts in the present appeal take the case quite outside the decision in the House of Lords. In order that a claim may arise under section 2 (1) (d) of the Finance Act, 1894, it must be shown that there is some item of property such as an annuity or other like interest which has been provided by the deceased, and that a beneficial interest in the piece of property has arisen on the death of the deceased.

In the *D'Avigdor-Goldsmid* case³² the deceased had provided the piece of property, in the form of a policy of insurance, but on the death of the deceased no beneficial interest arose by survivorship or otherwise, because the policy was absolutely and indefeasibly vested in the son of the deceased prior to the deceased's death. In the words of Lord Morton of Henryton³³: "The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his

³² [1953] A.C. 347.

³³ *Ibid.* 367.

“father’s death.” But in the present appeal Sir John Milne Barbour by the trust deed of 1929 assigned the fully paid up policies on his life to the trustees on trust to invest the proceeds as set out in the trust deed.

The beneficial interest of James Barbour in the present case (as a possessory interest) was in the proceeds of the policy, and not in the policy itself. So long as the settlor was alive that interest was an interest in expectancy. If he had died before the deceased, his interest would have failed completely, and his estate would not have been enriched in any way from the proceeds of the policies when in fact they became payable on the death of the deceased. Neither he nor anybody else had a beneficial interest in possession in the proceeds of the policies because of the nature of the policies themselves. But on the death of the settlor the beneficial interest did fall into possession, and the change was made from the beneficial interest in expectancy by the express terms of the settlement.

Some attempt was made to show that the beneficial interest was in the policy from the beginning, and that the death of the deceased made no alteration; and, there being no fresh beneficial interest created on the death, no liability to estate duty arose. In my view this argument cannot be sustained, and it is clear that it is raised to bring the facts of this case within the decision in the *D’Avigdor-Goldsmid* case.³⁴ In my view, the interest in the present case was the benefit of an obligation to pay a sum of money in a specified event, that is, upon the death of the deceased settlor. When the death occurs that sum of money becomes the proceeds referred to in clause 2 of the settlement. The beneficial interest that arose to the life tenant was in the proceeds, and not in the policy itself. The judge in the court below came to his conclusion after the most careful consideration of many cases and he set out his reasons quite fully in his judgment. With great respect to the judge, in my opinion the point at issue seems to me to be whether some beneficial interest in the proceeds of the policies arose on the death of the settlor for the first time. It is not a question whether the beneficial interest became more valuable upon the death, but whether the beneficial interest arose itself for the first time. In my opinion, it did, and the interest in expectancy had become the interest in possession and, accordingly, the provisions of section 2 (1) (*d*) apply. I would allow the appeal.

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³⁴ [1953] A.C. 347.

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ROMER L.J. It is with regret and diffidence, as I need scarcely say, that I differ from the views which the Master of the Rolls and Birkett L.J. have expressed in the judgments which have been read; but for myself I have arrived at the conclusion that the decision of Harman J. was right.

For the reasons which my Lords have stated I fully agree that the circumstances of the present case differ very considerably from those which were before the House of Lords in *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*³⁵ and to which the speeches of their Lordships were directed. Nevertheless, two points at least which are relevant to the present appeal do arise from the decision of the House. These points (both of which appear clearly from the speech of Lord Morton of Henryton³⁶) are (1) that the "other interests" which were provided by Sir John Milne Barbour were the two policies of assurance which are in issue in the case, and (2) that the question for decision is whether a beneficial interest in these policies accrued or arose on Sir John's death. If the true view of the matter be that James Barbour had a beneficial interest in the policies, and that such interest was the same in quality before the death of Sir John as it was afterwards, then it cannot be said that a different or additional interest accrued or arose when he died which attracted the operation of section 2 (1) (d) of the Act.

What, then, were the beneficial interests or rights in relation to the policies which were vested in James Barbour (a) before and (b) after the death of the settlor? Before the death he had the right to compel the trustees, as the legal assigns of the policies, to exercise such contractual rights against the insurance companies as the policies conferred upon the holders thereof and to restrain them (the trustees) from improperly disposing of or surrendering the policies in such a way as to constitute a breach of the trusts declared by the settlement. This right to enforce a due performance of the trusts was not peculiar to James Barbour, for it was common to all persons to whom beneficial interests in the policy moneys were given by the settlement; nor was the right conferred by the terms of the settlement, for it is a right of a kind which is extended to all *cestuis que trust* by our law.

In addition to this right, James Barbour was entitled (subject to the direction for accumulation) to receive the income of any "proceeds" of the policies which might have been paid to the trustees during the settlor's lifetime and invested by them so as

³⁵ [1953] A.C. 347.³⁶ *Ibid.* 367.

to form part of the trust fund; and this was a right which was conferred upon him by the grant itself and not merely by the court as incidental to his position as a beneficiary under a trust.

After the death of the settlor James Barbour's right to enforce performance of the trust still continued, and would have enabled him (and all the other beneficiaries under the settlement) to compel the trustees (in the improbable event of compulsion being required) to call in the policy moneys and to invest the proceeds in authorized securities. He also possessed under the terms of the settlement the right to receive during his life the income of those moneys when invested.

A comparison of James Barbour's position before and after the settlor's death shows that his right to compel the trustees to enforce their contractual rights under the policies, and to perform in other respects the duties imposed upon them by the settlement, was the same before the death as afterwards. As, however, in my judgment, this right should be regarded, not as a beneficial interest in the policies which the settlor provided, but as a right which the law attached to that beneficial interest, the question whether it underwent a change upon the death of the settlor is in fact immaterial. The vital question is whether James Barbour acquired a beneficial interest in the policies on his uncle's death which he had not possessed before.

The contention of the Crown is, firstly, that his life interest in the policy moneys, when invested, constituted a beneficial interest in the policies which the settlor had provided; and, secondly, that this interest was a mere interest in expectancy during the settlor's lifetime, and did not become an interest in possession until the policy moneys became payable by reason of the settlor's death. The first of these submissions is, I think, well founded: *Tennant v. Lord Advocate*.³⁷

The second submission, which was rejected by the learned judge, raises, as I think, a very considerable difficulty. It is true that under each of the policies with which this appeal is concerned, the event or contingency on which the sum assured was to become payable was expressed to be the death of the settlor; and it is equally true that neither James Barbour nor (within the terms of the settlement) the trustees could accelerate payment, in advance of the prescribed event, of the policy moneys. The trust fund under the settlement, however, was not to be constituted solely of the moneys, when invested, to be

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received by the trustees upon the death of the settlor; for the subject-matter of the trust was expressed by clause 1 of the settlement to be the policies of assurance, "and all moneys to become payable thereunder and the full benefit thereof," all of which were later referred to as "the proceeds" of the policies. Had James Barbour's life interest been confined to an interest in the moneys which the trustees should receive under the policies when the settlor died it is, I think, clear that his interest would have been merely expectant and contingent so long as the settlor was alive. The inclusion, however, in the trust fund of "all moneys to become payable" under the policies would plainly bring within the trusts of the settlement all such moneys as became payable while the life assured was still in being. As it happened, £750 did in fact become payable under one of the policies during Sir John Barbour's lifetime, and the income of that sum, when invested, was paid to James Barbour and nobody has suggested that it was wrongfully so paid.

The question arises then: By virtue of what beneficial interest did James Barbour become entitled to receive this income? The answer to this must surely be, by virtue of the beneficial interest in the policy to which he was entitled under the settlement. The next question is: By virtue of what beneficial interest did James Barbour become entitled to receive the income of the moneys which were paid to the trustees under the policies on the death of the settlor? The answer would again appear to be, by virtue of the beneficial interest in the policies to which he was entitled under the settlement.

Does, then, the beneficial interest which entitled him to receive the income of the last-mentioned moneys differ in quality from the interest which entitled him to receive the income of the £750, and would have entitled him to receive the income of any other "proceeds" of the policies that might have been paid to the trustees during the settlor's lifetime? I confess that I cannot see in what respect it does differ. The £750 and the moneys received on the settlor's death were equally moneys which became payable under the policies (or "proceeds" of the said policies) and James Barbour's right to receive the income of both funds derived under precisely the same title, namely, the life interest which he took under the settlement. In these circumstances I do not for myself see how, in the words of Lord Reid in the *D'Avigdor-Goldsmid* case,³⁸ it can truly be said

³⁸ [1953] A.C. 347, 375.

that "some right or property of a different kind from that "previously enjoyed by" James Barbour accrued or arose on the death of the settlor. For these reasons, accordingly, I would dismiss the appeal; but as my brethren take a different view, the appeal will be allowed.

Appeal allowed.

Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Parker, Garrett & Co.*

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[1955 E. 1527.]

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Roxburgh J.

*Administration—Order of application of assets — Will — Option—
Residue insufficient to meet debts and funeral and testamentary
expenses — Bequest of option to purchase shares — Whether such
bequest exonerated—Whether specific bequest—Administration of
Estates Act, 1925 (15 Geo. 5, c. 23), s. 34 (3), Sched. I, Part II.
Will—Specific bequest — Option to purchase shares — Not a specific
bequest—Availability for payment of debts.*

A testator by his will bequeathed to a beneficiary "an option "to acquire from my trustees at par value one thousand of my "ordinary shares of one pound each fully paid" in a named company. The testator's estate was solvent but the residue was insufficient to pay in full the debts, funeral and testamentary expenses and other liabilities of the testator.

On the question whether on the true construction of the will and by virtue of Part II of Schedule I to the Administration of Estates Act, 1925,¹ the shares, the subject of the option, should be

¹ Administration of Estates Act, 1925, s. 34: "(3) Where the estate "of a deceased person is solvent his "real and personal estate shall, "subject to rules of court and the "provisions hereinafter contained as "to charges on property of the "deceased, and to the provisions, if "any, contained in his will, be "applicable towards the discharge of "the funeral, testamentary and "administration expenses, debts and "liabilities payable thereout in the

"order mentioned in Part II of the "First Schedule to this Act."

Sched. I, Part II: "ORDER OF "APPLICATION OF ASSETS WHERE THE "ESTATE IS SOLVENT.

"1. Property of the deceased un- "disposed of by will, subject to the "retention thereof of a fund suffi- "cient to meet any pecuniary "legacies.

"2. Property of the deceased not "specifically devised or bequeathed "but included (either by a specific

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transferred (a) free from or (b) subject to bearing an aliquot part of the debts, funeral and testamentary expenses:—

Held, that neither the option to purchase the shares nor the beneficial interest represented by the difference between the stated price and the market value was a specific bequest and accordingly did not come within Part II of Schedule I to the Act of 1925. So long, however, as the purchase price stated in the will was, with the other available assets, sufficient for the payment of debts, it, and not the shares, constituted the fund available for that purpose.

Per curiam. Property subject to an option is the last to be available for the payment of debts; in so far as the property subject to the option is required for the payment of debts, the option over that property cannot be exercised at all, and the benefit of it is destroyed by operation of law.

ADJOURNED SUMMONS.

The testator, John Leonard Eve, who died on June 25, 1954, by his will dated February 8, 1951, after appointing executors and trustees and making sundry bequests, provided by clause 8: "I bequeath to Robert Chandler Brown [the second defendant] "an option to acquire from my trustees at par value one "thousand of my ordinary shares of one pound each fully paid "in the company J. L. Eve (Construction) Limited provided "that notice of his intention to exercise such option should be "given in writing to my trustees within one year of my death "and subject only to any requisite consent being obtained from "the holders of the preference shares in the said company for "the transfer of such shares to him and I express the hope that "he may be appointed a director of the said company."

By a letter dated January 19, 1955, the second defendant gave to the testator's executors notice of his intention to exercise the option given to him by clause 8 of the will.

"or general description) in a residuary gift, subject to the retention "out of such property of a fund "sufficient to meet any pecuniary "legacies, so far as not provided for "as aforesaid.

"3. Property of the deceased "specifically appropriated or devised "or bequeathed (either by a specific "or general description) for the "payment of debts.

"4. Property of the deceased "charged with, or devised or bequeathed (either by a specific or "general description) subject to a "charge for the payment of debts.

"5. The fund, if any, retained "to meet pecuniary legacies.

"6. Property specifically devised "or bequeathed, rateably according to "value.

"7. Property appointed by will "under a general power, including "the statutory power to dispose of "entailed interests, rateably according to value.

"8. The following provisions shall "also apply—(a) The order of "application may be varied by the "will of the deceased. . . ."

Doubts having arisen on the manner in which the testator's estate should be administered and the trusts of his will executed, the estate being solvent but the residue insufficient to pay in full the debts, funeral and testamentary expenses, the plaintiff bank, an executor, issued the present summons for determination, inter alia, of the question whether upon the true construction of the testator's will and of the Administration of Estates Act, 1925, the 1,000 shares comprised in the option should be transferred to the second defendant (a) free from or (b) subject to bearing an aliquot part of the debts, funeral and testamentary expenses of the testator.

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A. A. Baden Fuller for the plaintiff.

G. A. Rink Q.C. for the second defendant. An option to purchase shares is not a specific bequest of them. The option and right to the shares free from incumbrances is inconsistent with abatement.

[He was stopped.]

Michael Fox for the first defendant, the testator's widow, a person beneficially interested in the estate. There are four possibilities: the option to purchase these shares is either (a) a specific gift; or (b) it falls within some head other than paragraph 6 of Part II of Schedule I to the Act; or (c) there is some provision in the will which overrides the statutory order; or (d) a disposition of this nature is not caught by the schedule. It is submitted that this is a specific gift. [Reference was made to *Bothamley v. Sherson*.²]

[ROXBURGH J. Here is a direct gift of an element of bounty. This would not be a specific gift.]

If this is not a specific gift, the question is, what is it? It does not come within the schedule at all, which one would expect to cover all property.

[ROXBURGH J. Surely not options. One would not expect an option to be taken away, for to do so would be contrary to the nature of an option.]

Section 34 (3) of the Act of 1925 purports to deal with the whole of the real and personal estate of the deceased. [Reference was also made to *Theobald on Wills*, 11th ed., p. 144; *Jarman on Wills*, 8th ed., p. 1039; *In re Lander, decd.*³]

Michael Johnston for the third, fifth and sixth defendants, persons beneficially interested in the estate. The holder of the

² (1875) L.R. 20 Eq. 304.

³ [1951] Ch. 546; [1951] 1 T.L.R. 456; [1951] 1 All E.R. 622.

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option should bear his share of the debts and other expenses. The option gives to the holder a beneficial interest. If in the events which have happened certain charges fall by operation of law on the property in which he has a beneficial interest he must bear his share. [Reference was made to *In re Lander, decd.*³]

Peter Foster for the fourth defendant, who was also beneficially interested in the estate.

ROXBURGH J. By clause 8 of his will the testator bequeathed to Robert Chandler Brown an option to acquire from his trustees at par value 1,000 of his ordinary shares of £1 each fully paid in the company, J. L. Eve (Construction) Ltd., provided that notice of his intention to exercise such option was given in writing to the trustees within one year of his death and "subject only to any requisite consent being obtained from the holders of the preference shares in the said company for the transfer of such shares to him."

The question is where the benefit of the option stands in the hierarchy of assets for the payment of debts in a solvent estate. The option is a right to purchase 1,000 shares at par value, that is to say, at a price below their true value. Once exercised, it involves a contract between the trustees as vendors to sell and the purchaser to buy the shares at the stated price, free from incumbrances, and this is so, notwithstanding that there is a strong element of bounty in the transaction. The shares are not bequeathed subject to a charge or condition. An option to purchase cannot be a specific bequest of shares. If there is a specific bequest at all, it must be of the difference between the price stated in the will and the market value of the shares.

Such a benefit has never yet been held to be a specific bequest; nor does it fit in with any reported definition of a specific bequest. Sir George Jessel M.R. attempted such a definition with some trepidation in *Bothamley v. Sherson*,¹ where he said: "But if it satisfy both conditions, that it is a part of the testator's property itself, and is a part as distinguished, as I said before, from the whole, or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy." I understand the word "distinguished" to mean "distinguished" by the testator, not by some analysis in a court of equity. I think that subsequent passages in *Bothamley v. Sherson*¹ show quite plainly that this is so. As I have said before, I am not considering

³ [1951] Ch. 546.

¹ L.R. 20 Eq. 304, 309.

whether there is a specific bequest of shares. I am considering whether there is a specific bequest of the beneficial interest represented by the difference between the stated price and the market value. That ingredient has, quite clearly, not been distinguished by the testator himself. In my judgment that beneficial interest is not a specific bequest.

But it is said that if that is so, it has no place in the Schedule attached to the Administration of Estates Act, and that that is surprising. But I do not find it surprising if, as I think, the property subject to an option is the last to be available for the payment of debts. For, indeed, in so far as the property subject to the option is required for the payment of debts, the option over that property cannot be exercised at all, and the benefit of it is totally destroyed by operation of law. But so long as the purchase price stated in the will is, with the other available assets, sufficient for the payment of debts, it, and not the shares, constitutes the fund available for that purpose.

Declaration accordingly.

Solicitors: Sowman, Wells & Potter; Eland, Hore & Co.; Hopwood, Mote & Leedham-Green.

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Revenue—Income tax—Settlement—Revocability—Residence of settlor out of the jurisdiction—Property within the jurisdiction—Income from settlement included in settlor's assessment for surtax—Power from time to time to determine part of trusts—Equivalent to a power to revoke—Settlor out of the jurisdiction included—Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 38 (2), Sch. III, Part I.

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 7, 8.

Singleton,
 Morris and
 Romer L.JJ.

A settlement governed by the law of Bermuda of a value of some £700,000 made in 1947 by a settlor at all material times resident in Bermuda of property situated in the jurisdiction contained, in clause 3, trusts after the death of the settlor in favour of issue, and in clause 5 thereof the following provision: "(a) Notwithstanding 'the trusts hereinbefore declared the trustees if they in their 'absolute discretion think fit may at any time and from time to 'time during the life time of the settlor . . . declare that any part 'of the trust fund [not exceeding in any one period of three consecutive years the sum of £60,000] . . . shall thenceforth be held

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“in trust for the settlor absolutely and thereupon the trusts herein-
“before declared concerning the part of the trust fund . . . to which
“such declaration relates shall forthwith determine and the trustees
“shall thereupon transfer such part of the trust fund . . . to which
“such declaration relates to the settlor absolutely. . . .”

The trustees of the settlement were also resident in Bermuda.

The settlor was assessed to surtax under section 38 (2) of the Finance Act, 1938, in respect of her income under the settlement. The assessment was discharged by the Special Commissioners on the ground that section 38 had no application to a person resident outside the jurisdiction, and they did not in the circumstances consider whether the settlement contained a power of revocation.

The Crown appealed from that decision, and Danckwerts J. held that the settlement contained a power of revocation and that the assessment to super-tax was properly made on the settlor. On appeal by the settlor:—

Held, dismissing the appeal, (1) that whether the word “provision” in section 38 (2) of the Finance Act, 1938, meant a benefit conferred by the settlement or a clause or proviso of it, it was not impossible that if the trustees exercised their powers under clause 5 the fund might become exhausted, and thereby the trustees would wholly determine the provisions made in favour of issue and the trusts of clause 3, and thus “determine” a “provision” of the settlement, which accordingly fell within the subsection.

Per Singleton and Morris L.JJ. “Provision” in this context means a clause or proviso of the settlement.

(2) That the property comprised in the settlement being situate in the United Kingdom was within the inherent jurisdiction of the British Parliament as expressed in the Income Tax Acts, and there was nothing in the Act of 1938 which limited the operation of the general words in section 38 (2) so as to exclude a settlement governed by foreign law by a settlor resident out of the jurisdiction.

Astor v. Perry [1935] A.C. 398; 51 T.L.R. 325; sub nom. *Perry v. Astor*, 19 T.C. 255 distinguished.

Decision of Danckwerts J., ante, p. 220, affirmed.

APPEAL from Danckwerts J.¹

In 1947 the Countess of Kenmare made a settlement of a value of £700,000 for the benefit of her three children, all of whom had attained the age of 21 years. Lady Kenmare was not in any material year resident in the United Kingdom but the trust fund consisted of investments in the United Kingdom. The trustees were Bermudans, in which island the settlor resided, and the settlement was declared to be subject to the law of Bermuda.

The settlement contained a provision that the trustees should “in their absolute discretion pay the income” (or part thereof in their absolute discretion) “of the scheduled investments and

¹ Ante 220.

" of the property for the time being representing the same (hereinafter called ' the trust fund ') to the settlor during her life." The trustees were to hold all such income as should not be paid to the settlor on income account and were in their absolute discretion to pay the whole or any part of such balance from time to time to the settlor during her life, provided always that any such balance was to be added to the trust fund and to devolve accordingly. By clause 3, after the death of the settlor the trustees were to stand possessed of the capital and the income of the trust fund on the usual trusts for the benefit of children and issue of the settlor. Clause 5, which was the material clause, provided: "(a) Notwithstanding the trusts hereinbefore declared the trustees if they in their absolute discretion think fit may at any time and from time to time during the lifetime of the settlor by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely, and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely provided always that the foregoing power shall not be exercisable by the trustees so as to vest in the settlor in any period of three years the first of which shall commence on the date hereof and end on the same date in the year 1950 the second of which shall end on the same date in the year 1953 and so on in every third year a part or parts of the trust fund or property of a value or aggregate value exceeding £60,000 of the currency of the Islands of Bermuda. (b) If in any such period of three years the foregoing power shall not be exercised to the full extent of the said sum of £60,000 the deficiency may be carried forward so as to increase the amount in respect of which the said power may be exercised in any succeeding period of three years." There was then a provision as to the manner in which the value should be fixed.

Lady Kenmare was assessed to surtax in respect of the income of the settlement under section 38 (2) of the Finance Act, 1938.²

² Finance Act, 1938, s. 38: ". . .
 "(2) If and so long as the terms of
 "any settlement are such that—(a)
 "any person has or may have power,
 "whether immediately or in the
 "future, and whether with or with-
 "out the consent of any other person,
 "to revoke or otherwise determine
 "the settlement or any provision
 "thereof; and (b) in the event of the
 "exercise of the power, the settlor or
 "the wife or husband of the settlor

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The Special Commissioners discharged the assessment and held that Lady Kenmare being resident outside the jurisdiction at the material time was not liable to be assessed to surtax in respect of income from the settlement. In the circumstances they did not consider the question whether the settlement was revocable or otherwise determinable within section 38 (2) of the Finance Act, 1938.

The Crown appealed and Danckwerts J. on May 12, 1955, reversed the decision of the Special Commissioners, holding that the power in clause 5 to determine from time to time part of the trust, notwithstanding the limitation imposed on its exercise, was a power of revocation within the meaning of section 38 (2); that the property comprised in the settlement, being situate in the United Kingdom, came within the inherent jurisdiction of Parliament as expressed in the Income Tax Acts; and that there was nothing in the Act to limit the operation of the perfectly

"will or may become beneficially
"entitled to the whole or any part of
"the property then comprised in the
"settlement or of the income arising
"from the whole or any part of the
"property so comprised; any income
"arising under the settlement from
"the property comprised in the settle-
"ment in any year of assessment or
"from a corresponding part of that
"property, or a corresponding part
"of any such income, as the case
"may be, shall be treated as the
"income of the settlor for that year
"and not as the income of any other
"person: Provided that, where any
"such power as aforesaid cannot be
"exercised within six years from the
"time when any particular property
"first becomes comprised in the
"settlement, this subsection shall not
"apply to income arising under the
"settlement from that property, or
"from property representing that
"property, so long as the power
"cannot be exercised. . . . (7) The
"foregoing provisions of this section
"shall apply for the purposes of
"assessment to income tax for the
"year 1937-38 and subsequent years
"and shall apply in relation to any
"settlement, wherever made and
"whether made before or after the
"passing of this Act: . . ."

S. 41: ". . . (4) For the purposes
"of this Part of this Act—(a) the
"expression 'income arising under a
"settlement' includes—(i) any in-
"come chargeable to income tax by
"deduction or otherwise, and any in-
"come which would have been so
"chargeable if it had been received
"in the United Kingdom by a person
"domiciled, resident and ordinarily
"resident in the United Kingdom; . . .
"where the settlor is not domiciled,
"or not resident, or not ordinarily
"resident, in the United Kingdom in
"any year of assessment, does not
"include income arising under the
"settlement in that year in respect
"of which the settlor, if he were
"actually entitled thereto, would not
"be chargeable to income tax by
"deduction or otherwise by reason
"of his not being so domiciled, resi-
"dent, or ordinarily resident; . . ."

Sch. III: "Part I. Adjustments
"between the Settlor and Trustees.
"1. Where by virtue of any provision
"of section 38 of this Act any income
"tax becomes chargeable on and is
"paid by a settlor, he shall be en-
"titled—(a) to recover from any trust,
"tee, or other person to whom income
"arises under the settlement, the
"amount of the tax so paid; . . ."

general words in section 38 (2) of the Act of 1938 so as to exclude the income of a settlor resident out of the jurisdiction.

The settlor appealed.

F. Heyworth Talbot Q.C., F. N. Bucher Q.C. and H. H. Monroe for Lady Kenmare. This appeal raises two points on the construction of subsection (2) of section 38 of the Finance Act, 1938. It is, in its effect, a far-reaching subsection, and somewhat surprising, because it involves that there may be a charge of surtax and in certain cases a charge of income tax upon the income which the person charged may never get. It is enough if there is the power to revoke or otherwise terminate a settlement or any provision thereof. Part I of Schedule III of the Act provides that where by virtue of section 38 any income tax becomes chargeable on and is paid by the settlor he shall be entitled to recover the tax paid from the trustees or other person to whom income arises under the settlement. The questions to be decided by the court are: (1) whether there is a power to revoke or otherwise determine the settlement or any provision thereof; and (2) whether section 38 (2) can in any event apply where the settlor is not resident in the United Kingdom, where the trustees of the settlement are not resident in the United Kingdom, and where the settlement itself is a foreign settlement in the sense that the forum of administration is a foreign court. The question arises whether it is within the jurisdiction of the Parliament of the United Kingdom to impose a tax upon a non-resident person in respect of income which he does not receive. In one sense, so far as the courts of this country are concerned, it may be said that there is no limit to the jurisdiction of Parliament; in another sense there must be certain territorial limits inherent in its jurisdiction. In this case the property covered by the settlement is in this country, being shares in British companies. In other words, it is English income.

The Inland Revenue say that if there is income of a settlement arising from a source in this country, that is all that matters and tax is chargeable; that it does not matter whether it is an English or a foreign settlement. In the present case most or all of the securities have now been transferred by the trustees into foreign securities. The Special Commissioners were in favour of Lady Kenmare on the jurisdiction point, but the judge decided against her on both points. As to the revocation point, it is submitted that the discretionary power of the trustees under clause 5 is not a power to revoke or otherwise determine the settlement or any

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provision of it. It is a power to take certain action pursuant to the settlement itself. It is, indeed, a provision of the settlement, and if the trustees exercised that power they would not be revoking or determining the settlement.

[SINGLETON L.J. I suppose it would be wiping out the settlement if the lady lived long enough.]

It does not determine the settlement. That would still be in existence although it had no funds left. The decision in *Berkeley v. Berkeley*³ and the speech of Lord Simonds⁴ was in reference to a section of another Act. This court has to consider the meaning of "provision" in its context in the Act of 1938. If it means that which is provided by the settlement, then, it is submitted, the section is meaningless. "Provision" must mean a clause in the written settlement. "Revoke" should only be used for the power of the settlor to recall the settlement. Where the power is within the framework of the settlement it is a clause which is used in the administration of the settlement and no action which has been taken up to now would terminate the settlement.

Parliament has no jurisdiction to tax a non-resident in respect of income which is not his income. This, moreover, is a Bermudan settlement which is to be construed under Bermudan law. The income is only payable to the settlor at the discretion of the trustees, and it is the income of the trustees, who are also out of the jurisdiction. In those circumstances section 38 (2) must be construed with that limitation: see *Perry v. Astor*.⁵ Part I of Schedule III provides that the settlor may recover the tax from the trustees or other persons to whom income arises under the settlement, but foreign trustees or beneficiaries might refuse to pay and foreign law might not enforce the claim. [*Colquhoun v. Heddon*⁶ and *Camille and Henry Dreyfus Foundation Inc. v. Inland Revenue Commissioners*⁷ were also referred to.]

Geoffrey Cross Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown. If this settlement falls within the provisions of section 38 (2) there is no limitation in the Act which precludes its application to a person non-resident in the United Kingdom in respect of the income from property in this country. Section 41 (4) and Part I of Schedule III must also be considered. Section 41 (4) (a) (i) excludes income from a settlement arising

³ [1946] A.C. 555.

⁴ Ibid. 580.

⁵ (1935) 19 T.C. 255; 51 T.L.R. 325.

⁶ (1890) 25 Q.B.D. 129; 6 T.L.R. 331; 36 T.C. 126.

⁷ [1956] A.C. 39; [1955] 3 All E.R. 97.

from a foreign source, but would include income arising under a settlement from a source in the United Kingdom. By section 41 (4) (b) the expression "settlement" includes any disposition, "trust, covenant or arrangement dealing with property. It is wrong to think of the settlement as being the document which evidences its terms. The settlement is the legal state of affairs dealing with the property. The court has therefore to consider what is the revoking or determination of the settlement—the power to hand over the whole of the fund. It is submitted that such a power would be a power to determine the settlement. There would be nothing left to be operated upon. No doubt the document would remain, but that would not be *ad rem*. If somebody put money in, it would be a new settlement—the first settlement would have been determined. A power of the trustees at any time to pay over half the fund to the settlor would not be a total determination, but it would be a partial revocation or determination. That is caught by the words in section 38 "or any provision thereof." Subsection (2) (a) is relating not only to revocation or determination of the whole settlement but also to income arising from a corresponding part of the property. There is a continuing power of part determination which may eventually extend to the whole fund. "Or any provision thereof" covers the time when any sum is taken out, and "any person has or may have power" applies to the time, which may arise, when the trustees would have power to pay out the whole of the remaining funds. It is not necessary to predicate that it *will* arise. Section 38 is intended to deal with cases where a person who has income which is liable to surtax divests himself of and alienates his property in such a manner that it can or may come back to him. The legislature has thought it to be reasonable in such a case that that person's income should continue to be taxed. The settlement in this case falls under section 38 (2) (a) because there is a future contingent power to determine the whole. If that is held not to be correct, there certainly was an immediate power to divest the fund of £60,000.

*Perry v. Astor*⁸ was decided on section 20 of the Finance Act, 1922, which was replaced by the Act of 1938, and it may be thought that the legislature had in mind the question of extra-territoriality when section 38 was drafted. It is submitted that there is no warrant for confining the word "settlement" to a disposition taking effect under English law. There is no prospect of injustice arising in the present case because under Schedule III,

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⁸ 19 T.C. 255.

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Part I, the settlor will have a right to recover the tax from the trustees, against whom she could get leave to serve a writ out of the jurisdiction. The fact that there may be difficulty is not the test. The right to recover is given by statute and the difficulties are not material.

Heyworth Talbot Q.C. in reply. Every line of Schedule III, Parts I to III, indicates that Parliament was not thinking of applying section 38 to a foreign trust. *Perry v. Astor*⁸ is relevant to the court's consideration, because in order to arrive at their decision the House of Lords went down to fundamental conclusions, the result of which is relevant today.

Cur. adv. vult.

SINGLETON L.J. This is an appeal from the judgment of Danckwerts J. who allowed the appeal of the Inland Revenue Commissioners against the decision of the Special Commissioners. That which we have to consider appears clearly from the statement at the beginning of the report of the case before Danckwerts J.¹ "The question on this appeal arose in connexion with "an assessment to surtax made on Enid, Countess of Kenmare, "which, so far as is material, depended on the assessment as "her income of certain income arising from investments in the "United Kingdom under a settlement made by her dated "September 24, 1947. Lady Kenmare was not in any material "year resident or ordinarily resident in the United Kingdom. "She had three children, all of whom had attained the age of "21 years, and for the benefit of whom she had been desirous "of making a settlement. Investments (referred to in the "schedule to the settlement) to the value of some £700,000 were "settled by her on trust for investment."

[His Lordship read the statement of facts which is set out above and continued:] The Crown having appealed from the decision of the Special Commissioners discharging the assessment, Danckwerts J. held, (1) that the settlement is clearly one which is revocable within the provisions of section 38 (2) of the Finance Act, 1938, and (2) that the point raised as to jurisdiction failed. Accordingly, he allowed the appeal and ordered that the case be remitted to the Special Commissioners to adjust the assessment.

Clause 13 (a) of the settlement reads: "This settlement shall "be construed and take effect in accordance with the law of the

⁸ 19 T.C. 255.

¹ Ante 220, 221.

" Islands of Bermuda and the courts of these Islands shall be the
 " forum for the administration thereof." It is followed by clause
 13 (b), which appears to me to be somewhat unusual: " (b) Pro-
 " vided always that the trustees may at any time and from time
 " to time by writing under their hands or by deed (but during the
 " lifetime of the settlor only with her consent in writing) declare
 " that the settlement shall from the date of such declaration take
 " effect in accordance with the law of any other place in any part
 " of the world and that the forum for the administration thereof
 " shall thenceforth be the courts of that place and as from the
 " date of such declaration the law of the country named therein
 " shall be the law applicable to this settlement and the courts
 " of that country shall be the forum for the administration thereof
 " but subject to the power conferred by this sub-clause and until
 " any further declaration is made hereunder."

The scheduled investments, the subject-matter of the trust,
 were investments by way of mortgage, or loan, or debentures and
 stocks and shares in English companies.

I propose to consider the points raised in the order in which
 the judge considered them. [His Lordship read section 38 (2)
 of the Finance Act, 1938, and continued:] It is claimed by the
 commissioners that the trustees " have or may have power to
 " revoke or otherwise determine the settlement or any provisions
 " thereof." The appellant settlor contends that there is no such
 power to be found within the terms of the settlement. Our
 attention was directed to clause 3, which provides that, after the
 death of the settlor, the trustees should, subject to the provisions
 of the clause, stand possessed of the capital " in trust for all or
 " any of the children or child of the settlor now living or here-
 " after to be born who being male attain the age of 21 years or
 " being female attain that age or marry under it and if more than
 " one in equal shares."

On behalf of the settlor it was submitted that there was no
 power given to revoke or to determine the settlement or any
 provision thereof. I do not read the argument now as it is
 fully set out in the judgment of Danckwerts J. to which I shall
 come.

Mr. Cross, for the commissioners, referred to the definition
 of " settlement" in section 41 (4) (b) of the Act of 1938, and
 pointed out that a document was not essential to a settlement,
 but was merely the legal way of doing it. He submitted that if
 there was power in a settlement to hand over to the settlor the
 whole fund, such a power would be a power to determine the

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settlement, while if there was power to hand over one-half of the fund, that would be a power to make a partial revocation or determination and would be caught by subsection (2)—and he drew attention to the wording of subsection (2) (b). He asked us to read the word “provision” in subsection (2) (a) as covering the amount provided, or anything affected, by the settlement.

Danckwerts J. in dealing with this point said²: “It was argued by Mr. Heyworth Talbot on behalf of Lady Kenmare that there was no power to revoke the settlement or any provision thereof, and he sought in aid the reference in paragraph (b) of subsection (2) dealing with beneficial interests in any part of the property as showing that the references to partial revocation were in a different context and not to be imported into paragraph (a) (which is really the material provision which I have to apply), because there is no appropriate context. It is plain that in the event of the trust being determined in this settlement the person who benefits is the settlor (Lady Kenmare), who becomes absolutely entitled to the property in respect of which the trustees exercise their power of release. What the trustees can in fact do under the provisions of clause 5 is not expressed, it is true, by using the word ‘revoke.’ What they can do is, they may ‘by writing under their hands declare that any part of the trust fund not exceeding the amount hereinafter mentioned shall thenceforth be held in trust for the settlor absolutely’; and the clause proceeds: ‘and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely.’ Mr. Heyworth Talbot argues that that is not a provision which determines the settlement or any provision of the settlement, because it merely substitutes one trust for another, and the settlement continues: it is an exercise of the power within the framework of the settlement. That argument at first sight appears to have some attraction, but it is not a correct way of looking at the matter. In the first place, I am satisfied that although the word ‘revocation’ is not expressly used, the effect of the provision in clause 5 (a) is a revocation of the trust; and it seems to me that if there is a revocation of the trust, whether it is subject to a limitation or not, there is a revocation or determination of either the settlement or some

² Ante 220, 228.

“provision thereof. It seems to me that there is clearly a determination of the provisions settling the property in trust for other persons in respect of the trust fund so far as the trustees have by their declaration in writing power to deal with the trust fund at any particular time, and this is a power which might in the end, therefore, possibly be exercised in regard to the whole trust fund. Therefore, so far as that point is concerned, the settlement is clearly one which is revocable within the provisions of section 38 (2) of the Finance Act, 1938.”

The word “provision” when used for the second time in section 38 (1) (a) clearly means a clause, or part of a clause, in the settlement, and I think it has the same meaning earlier in section 38 (1) (a) and 38 (1) (b). In subsection (2) the words “or any provision thereof” following the word “settlement” should be given the same meaning. Before subsection (2) comes into play it must be shown that someone “has or may have” power to revoke or otherwise determine the settlement or a “provision of the settlement,” by which I mean words which are contained in the settlement, “a clause or proviso, a defined part of a written instrument.” Much argument was devoted to this point, based upon *Berkeley v. Berkeley*.³ It may be said that the word “provision” is used in a different sense in different parts of the section, which would be odd. Whichever is the right view, the answer to the problem before us is not determined thereby.

On a fair reading of the terms of the settlement I am satisfied that the position created was within the words of section 38 (2) (a) and that consequently the income from the settled fund falls to be treated as the income of the settlor, subject to the second point in the case. The words “or may have” follow the words “if . . . any person has.” It appears to me that the term of the settlement in clause 5 that the trustees may pay out to the settlor in any three years the sum of £60,000 (with a carry forward) might result in time in the fund being exhausted. That is not likely unless there should be a fall in the value of the investments held under the trusts, but it is something which might happen—in other words, it is covered by the words “may have.” If the settled fund disappeared that would be a determination—not a revocation—of the settlement. There would be nothing left except a document. If the position created by the settlement is such that that may be brought about, the case is then within section 38 (2) (a), and, moreover, if the whole of

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³ [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

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the settled fund goes there is nothing left to which the trust in clause 3 of the settlement can apply and, consequently, there is, or would be, a determination of that provision, to wit, of clause 3.

Thus, I agree with the conclusion at which Danckwerts J. arrived, though I do not go quite so far as he did in some respects. We were referred to the judgment of Wynn-Parry J. in *Saunders v. Inland Revenue Commissioners*,⁴ where he held that the word "provision" in section 38 (2) meant a benefit conferred by the settlement, as the surrounding language was inapt if taken to refer to a defined part of the settlement. In the course of his judgment he said that he accepted the principle that the word "provision" should be given the same meaning wherever it occurs in the section. I am clearly of opinion that in subsection (1) the word "provision" is used in the sense of a clause in the settlement, and that is carried further by the use of the word in subsections (5) and (7), and in the Third Schedule.

On the other point in the case it was submitted on behalf of Lady Kenmare that section 38 of the Act of 1938 does not apply to the settlement as the settlor was not and is not resident in this country, nor are the trustees, and the settlement is a foreign settlement (see clause 13 (a)). From the date of the settlement the income was income of the trustees, it was said, and Parliament has no jurisdiction to lay a charge of tax on a non-resident in respect of income to which that non-resident person is not entitled; the trustees having a discretion whether they pay her or not. Reliance was placed on the decision of the House of Lords in *Perry v. Astor*⁵ and, in particular, on the speech of Lord Macmillan in that case. The case arose under section 20 (1) (a) of the Finance Act, 1922, which may be described as the forerunner of section 38 of the Act of 1938 now under consideration. The finding of the Special Commissioners reads thus⁶: "We, the Commissioners who heard the appeal, held that the matter was concluded by the decision in the case of the *Marchioness of Ormonde v. Brown*,⁷ and that section 20 (1) (a) of the Finance Act, 1922, could not be applied so as to charge the respondent with income tax on foreign income which under the provisions of the settlement was income of the American trustee. We accordingly amended the assessments by substituting amounts computed under rule 2 of Case V for those computed under rule 1 as from the date of the settlement." This was held by

⁴ Ante 283; [1955] 3 All E.R. 274.⁵ (1935) 19 T.C. 255.⁶ Ibid. 259.⁷ (1932) 17 T.C. 333.

the House of Lords to be correct. The section is sufficiently set out at p. 284.

The passage in Lord Macmillan's speech to which I have referred reads^s: "My Lords, the argument for the Crown has at first sight an attractive simplicity. Is the appellant able, by means of the exercise of a power of revocation contained in a disposition made directly by himself, to obtain for himself the beneficial enjoyment of the income which, under that disposition, his American trustee collects? The answer must plainly be in the affirmative. And does that income arise from stocks and shares in a place out of the United Kingdom? The answer must again be in the affirmative. The words of section 20 and rule 1 of Case V fit the facts precisely, and that, contends the Crown, must end the matter.

"This appearance of simplicity is delusive, for if, as the Crown submits, the critical words 'any income' with which section 20 opens, are read without any qualification, territorial or other, the most startling anomalies result. Thus, if the section is to be read as applicable to any income anywhere of which any person anywhere can by the exercise of a power of revocation obtain for himself the beneficial enjoyment, it covers the case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country. In the case put, the American settlor is able by exercising his power of revocation to obtain for himself the beneficial enjoyment of the income of the stocks and shares which he has settled. That income, therefore, is to be deemed for British income tax purposes to be his income and not to be the income for those purposes of the person resident in this country who is entitled to it. Incidentally one asks how a British Income Tax Act can impute to an American citizen 'for the purposes of the enactments relating to (British) income tax (including super-tax)' an income of which the American citizen has by the law of his own country effectually divested himself."

Mr. Cross, for the commissioners, pointed out that section 20 (1) (a) of the Act of 1922 was repealed by the Act of 1938 and was replaced by carefully thought out provisions in the light of the words used by Lord Macmillan, and that we have to consider the provisions of the Act of 1938. He referred to section 38 (7) to show that the provisions of the section apply to any settlement

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wherever made and to the words "any income arising under the "settlement" in section 38 (2) and to section 41 (4) (a) to show what is covered by the words "income arising under the settlement": and he added that income from investments in this country would be chargeable to tax against a person who was not residing in this country. I agree with the judgment of Danckwerts J. that this point fails. Danckwerts J. stated his conclusion thus⁹: "I am unable to find, and Mr. Heyworth Talbot was really unable to suggest, what limits I could put "upon the provisions of section 38 (2) which would be consistent "with section 41 and would operate in the way in which Lord "Macmillan found himself able to deal with the matter in *Perry v. Astor*.¹⁰ I am unable, therefore, to limit the words in the "way in which it was contended on behalf of Lady Kenmare and "which satisfied the Special Commissioners, and I must come "to the conclusion that the terms of this settlement and the "position of the settlor fall within the provisions of section 38 (2) "of the Finance Act, 1938, and, accordingly, the appeal must "be allowed."

Before this court Mr. Heyworth Talbot further submitted that Parliament could not have intended that the provisions of section 38 should extend to a case of this nature in view of the provisions of Part I of the Third Schedule to the Act (applied by section 38 (5)). He argued that if the settlor paid the tax he or she would not be able to recover it. It is unlikely that any such question would arise, but none the less the point raised must be considered. Paragraph 1 of Part I of the Schedule contains the words: "He shall be entitled to recover from any "trustee . . . the amount of the tax so paid." That means, entitled to obtain judgment for the amount: it is in no sense a guarantee that judgment so obtained will be satisfied. I know of no reason why the settlor should not be allowed, if necessary, to obtain leave to serve a writ outside the jurisdiction under Ord. 11, r. 1 (g), or, perhaps, (c), and to obtain judgment against the trustees if he had paid. Such an action might be brought against the company claiming a declaration and an injunction if the trustees had not paid the amount due to the settlor, and the trustees could be joined as necessary parties. If a judgment so obtained could not be enforced that is the misfortune of the settlor, who appointed trustees who were not resident here and gave them charge of funds invested in this country. The position would be precisely the same as if someone

⁹ Ante 220, 231.¹⁰ 19 T.C. 255.

had been held entitled to contribution, or to an indemnity, but the party against whom the order was made could not meet his liability.

This point fails. In my opinion the judgment of Danckwerts J. was right and the appeal should be dismissed.

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MORRIS L.J. The settlor submits that there are two reasons why the income arising under the settlement should not be treated as her income by virtue of section 38 of the Finance Act, 1938: firstly, that the terms of the settlement are not such that the provisions of section 38 (2) of the Finance Act, 1938, apply to them; secondly, that the provisions of the Finance Act, 1938, do not apply for the reasons that the settlor and the trustees of the settlement are not resident in this country and that the settlement is governed by the law of Bermuda—which is the forum for the administration of the settlement.

In dealing with the first of these submissions the question arises whether there is a power “to revoke or otherwise determine the settlement or any provisions thereof.” The meaning of the word “provision” as used in its context has given occasion for much controversy. Before dealing with that matter it is desirable to consider whether there is a power to “revoke or otherwise determine” the settlement. The words “revoke” and “determine” both denote putting an end to the settlement. I do not consider that it is necessary to express any concluded opinion as to the respective meanings of the two words. The word “revoke” might denote a cancellation of a settlement before it has been effectively operated; the word “determine” might denote the bringing to an end after a settlement has for a time been effective. The word “revoke” might relate to what a settlor himself could do and the word “determine” might denote that which someone else might do.

It is sufficient for present purposes that each word conveys the suggestion of bringing something to an end. It seems to me that one very effective way by which a settlement might be determined would be by withdrawing all the capital of the settlement. It becomes necessary, therefore, to investigate (following the wording of section 38 (2)) whether any person has or may have power whether immediately or in the future, and whether with or without the consent of any other person, to determine the settlement. The words “whether any person has or may have power” can cover both the case of someone having a present power and the case of someone who may in the future have a

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power. Thus it may be that if someone has a present power to withdraw from time to time stated amounts from the capital there may come a time when, because the amount of capital remaining is less than that which he may withdraw, he becomes in a position by his next operation of withdrawal effectively to put an end to or determine the settlement.

The provisions of clause 5 (a), (b) and (c) of the settlement enable the trustees of the settlement to "declare" that a "part" of the trust fund shall be held in trust for the settlor absolutely. As to that part the trusts forthwith "determine." Such "part" of the trust fund is a part not exceeding £60,000 in value every three years: the value is value "of the currency of 'the Islands of Bermuda'; to the extent that if in a three-year period there has been a non-exercise of the power there may be a carry-forward. It was submitted on behalf of the appellant that it cannot be predicated that a time will ever come when by an exercise of the powers given by clause 5 the trustees will be in a position to remove all remaining capital funds from the trust. This is true. There can be no certainty. There is the uncertain element of the length of life of the settlor. There is the uncertain element as to the value of the trust fund. It may increase or appreciate or it may not. The value in the currency of Bermuda may fluctuate. Furthermore, it was submitted that, even if the result of the operation of clause 5 of the settlement may be to exhaust the funds, there is even so no revocation or determination of the settlement. But it seems to me that if the trustees by one or more declarations bring it about that the trusts concerning the greater part of the trust fund are "determined," the time may come when the trustees, by declaration made by them, may be in a position to exercise their power so that it affects all the remaining part of the trust fund: if so, the trusts concerning that remaining part of the trust fund would "forthwith determine." Such a time "may" come even though it may not seem likely that it will. If the trustees were in that position they would "have power . . . to . . . determine the 'settlement.'" It seems to me that the trustees "may have" such power "in the future." The wording of section 38 (2) (a) is, therefore, satisfied. In the situation envisaged the wording of section 38 (2) (b) would also be satisfied for, on the exercise of the power, the settlor would "become beneficially entitled to 'the whole or any part of the property then comprised in the 'settlement.'"

I consider, therefore, that the trustees may have power in the future to "determine the settlement." The word "settlement" is defined by section 41 (4) (b) of the Finance Act (for the purposes of Part IV) to include any disposition, trust, covenant, agreement or arrangement. This definition does not make it necessary to regard the word "settlement" as only denoting the document or instrument (if any) recording the terms of the disposition, trust, covenant, agreement or arrangement. I consider that a settlement may be "determined" even though some deed or written instrument remains physically in existence.

If the view which I have expressed is correct it will suffice for a decision on the first of the two main questions in the appeal. But it is desirable further to consider whether there is or may be a power to revoke or otherwise to determine any "provision" of the settlement. The phrase "provision of the settlement" is one that blossoms with ambiguity. The difficulty here is that some words in the vocabulary of speech and writing are perforce made to do service in varying contexts with varying meanings. When examining what is meant by a provision of a settlement it is necessary to consider the meaning both of the word "settlement" and of the word "provision." The definition of the word "settlement" merely records what is to be included. The word "provision" may denote that which is provided: it may denote some clause or part of the words of some deed or instrument or agreement which is or which effects a settlement.

If the word "provision" is interpreted as meaning that which is provided, then, in my judgment, the effect of clause 5 of the settlement is that the trustees may have power in the future to determine the provision of the settlement. Since on the exercise of the power the settlor would become beneficially entitled, then the wording of (a) and (b) in section 38 (2) of the Finance Act, 1938, would be satisfied.

If the word "provision" is interpreted as meaning a clause or part of the words which effect a settlement, then if by successive exercise or deferred exercise of the power given by clause 5 of the settlement the capital becomes completely withdrawn, the result would be to prevent the operation of clause 3 of the settlement, which stipulates that "After the death of the settlor the trustees shall stand possessed of the capital (including any balance on income account as provided in clause 2 (b) hereof) and future income of the trust fund in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the settlor." It is to be observed that the

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clause states that the trustees "shall stand possessed of the "capital . . . and future income." If, therefore, before the death of the settlor all capital was withdrawn from the trust, the trustees could not so stand possessed. The result would be that by the exercise of their power the trustees would prevent clause 3 from ever coming into play. Can it be said that the trustees had power to "revoke" clause 3? Can it be said that they had power to "determine" clause 3? Their powers did not enable them to deal with clause 3 in isolation. If the notion of determining implies putting an end to something which is operating, can there be determination before there is any operation? These questions are as elusive as are the meanings of the words which give rise to the questions. But, endeavouring to read the words of section 38 (2) (a) in reasonable manner, my view is that the exercise by the trustees of their powers under clause 5 endows them with the power to determine clause 3 if that clause is a "provision" of the settlement.

If the above conclusions are correct then it is immaterial in this appeal whether the word "provision" in its context bears one or other of the meanings to which I have referred. That question is, however, of great importance. The words "provision" "thereof" clearly refer to the "settlement": the words, therefore, mean "provision of the settlement." While any reference to a provision "of" a settlement could denote a provision in either of its two meanings, the word "of" seems to me to be slightly more appropriate if "provision" means a clause than it would be if "provision" refers to that which is provided. It is to be observed that in the opening words of the section the word "terms" is found. It can, therefore, be suggested that if it was intended to refer to a clause in a settlement the word "term" and not "provision" would have been selected.

Assistance can, I think, be derived by looking at the words used in section 38 (1). It must, of course, be remembered that a word can be used in a section with two quite distinct meanings. The opening words in section 38 (1) (a) correspond for nearly the first five lines with the opening words in subsection (2) (b). Where later in subsection (1) (a) there is a reference to payments which may be made "by virtue of" a "provision" of a settlement it seems to me that the word "provision" is being used in the sense of a clause or part. The words "by virtue of" point to that conclusion. I consider that in subsection (2) the word "provision" is used in similar sense. The word "provision" in

the phrase "provision of the settlement" marches with the word "provision" in the phrase "provision of section 38" in the Third Schedule and is, I think, in each instance used in the sense of a term.

I have for these reasons come to the conclusion that the word "provision" is used in the sense of a clause or term or part as opposed to the sense of denoting that which is provided.

The second contention of the settlor is that the legislature did not intend the provisions of section 38 of the Finance Act, 1938, to apply to a foreign settlement and has not so enacted that they do. In support of that contention attention is directed to the contents of the Third Schedule and it is submitted that if they would not avail a settlor resident abroad as against trustees of a foreign settlement who are abroad, an indication is thereby given that section 38 does not apply where these circumstances exist. It was submitted that section 38 (2) only applies to a settlement if the trustees of it are effectively under the control of the English courts and if it is to take effect in accordance with English law.

There are two considerations which, in my judgment, indicate that the contention should not be upheld. In the first place, the language of section 38 (7) shows that a settlement may be within the statutory definition irrespective of where the settlement is made. In the second place, the careful definition in section 41 of the phrase "income of the settlement" shows that the legislature was clearly providing for cases where a settlor is not domiciled here and is not resident here and is not ordinarily resident here. The legislature was enacting within the limitation which Lord Russell in his speech in *Perry v. Astor*¹¹ described as being inherent in all our income tax legislation that what is taxed is either (1) income which is here or (2) income of a person resident here. The income which is affected if section 38 applies in this case is only the income which is here, and, in my judgment, the legislature contemplated and covered the cases of non-resident settlors. I cannot think that this settlement is excluded merely because it is provided in the settlement that it is to be governed by foreign law. Upon analysis it must be that this is the sole circumstance upon which the settlor can rely in support of the present contention.

It may be that the rights given to a settlor by the Schedule will not always be effectively available as against foreign trustees. In the case of settlements made after the Act of 1938 a settlor

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¹¹ 19 T.C. 255, 280.

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could always insert suitable provisions in the settlement to ensure indemnity. Immediately prior to the date of the settlement in this case (September 24, 1947) the settlor was absolutely and beneficially entitled to certain stocks, shares and securities in the United Kingdom, the income from which was liable to United Kingdom income tax and surtax in her hands. But, quite apart from this, it seems to me that the Schedule merely gives a de jure right of recourse and the legislature does not purport to ensure that such right of recourse would in all cases prove effectively available. For these reasons I consider that the settlor's submissions fail and I would dismiss the appeal.

ROMER L.J. It is the contention of the settlor that no such power of revocation or determination as is referred to in section 38 (2) of the Finance Act, 1938, was or is vested in any person under the terms of the settlement which she executed on September 24, 1947, and that, accordingly, she was free in the relevant year of assessment (1947-1948) from the liability to surtax which arises in cases to which the subsection applies. The Crown, on the other hand, submit, and it was so held by Danckwerts J., that under the terms of the settlement the trustees thereof have, or might have, power in the future to revoke or otherwise determine the settlement or some provision thereof; and that inasmuch as Lady Kenmare would or might become beneficially entitled, if the power were fully exercised, to the whole of the property then comprised in the settlement, Lady Kenmare was rightly assessed on the footing that section 38 (2) applied.

Although, in my view, the question in issue falls primarily to be answered by reference to the trusts declared by the settlement, there was much discussion during the argument before us as to the meaning of the word "provision" in the context in which it appears in the subsection. Mr. Heyworth Talbot and Mr. Bucher contended that the word is used in the sense of some clause or other part of a written instrument. Mr. Cross, for the Crown, on the other hand, submitted that it meant, or at least included, some beneficial interest which is provided by a settlement. It seems to me that there is much to be said for each of these views. If "provision" was intended to be referable to some clause or term which appears in the settlement, then the word "determine," with which "revoke" is disjunctively associated, would not only be inapt but otiose; for "revoke" is just as applicable to the cancellation of a particular part of a written

instrument as it is to the cancellation of an instrument as a whole—as was pointed out by Wynn-Parry J. in *Saunders'* case.¹² As against this it seems reasonably clear that, apart, possibly, from the first occasion where the word “provision” appears in section 38 (1), it was intended in that subsection to have the meaning of some written provision, which would in most cases be a covenant, contained in a settlement. Moreover, as Morris L.J. observed during the hearing, the word as used in the first line of paragraph 1 of Part I of the Third Schedule to the Act (“where by virtue of “any provision of section 38 of the Act,” et cetera) would seem to be used in reference to the wording of that section.

However, as Lord Simonds pointed out in *Berkeley v. Berkeley*,¹³ the word “provision” is “a word of diverse meanings “which slide easily into each other. It may mean a clause or “proviso, a defined part of a written instrument. Or it may mean “the result ensuing from, that which is provided by, a written “instrument or part of it.” It is, of course, an accepted rule of construction that where the same word appears more than once in a section of a statute it should receive the same interpretation wherever it occurs; and ambiguity in one place will be resolved by any clarity of meaning which is apparent from another. Nevertheless, where a word has shades of meaning which merge into each other it is, I think, permissible to vary the shade according to each individual context without transgressing the rule to which I have referred. I am relieved, however, from the necessity of expressing any final conclusion on this question because this case, in my opinion, falls within section 38 (2) whether the word “provision” in the subsection means “clause” or “result.”

The relevant terms of the 1947 settlement have been fully stated by my Lord and I will not repeat them.

The settlor contends that declarations made by the trustees under clause 5 of the settlement and the consequent withdrawals of capital sums for the benefit of Lady Kenmare constitute no more than a due performance by the trustees of one of the trusts of the settlement and cannot be regarded in any sense as a revocation or determination of the settlement or of any provision thereof. The position was likened in argument to a power vested in trustees to make advancements to income beneficiaries out of capital; or to resort to capital in order to maintain a life tenant's income at a prescribed minimum level. It was suggested that in neither of these illustrations could the trustees be regarded as

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¹² Ante 283; [1955] 3 All E.R. 274.

¹³ [1946] A.C. 555, 580.

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having power to determine the settlement or any provision of the settlement, either for the purpose of section 38 or for any other purpose, notwithstanding that the exercise of their powers might eventually diminish the trust capital to vanishing point, to the loss and prejudice of the remaindermen.

I am not clear that if, in these illustrations, the person to whom the advancements were authorized to be made, or whose income was to be maintained, were the settlor or the wife or husband of the settlor, and if during the lifetime of such person the whole trust capital might be exhausted by the exercise of the power, the case would not fall within section 38 (2). But, however that may be, what we are concerned with are the powers which are vested in the trustees of the settlement of 1947 and the possible result of those powers being exercised in full. I do not think that each authorized withdrawal of £60,000 during a three-year period could in itself be regarded as a revocation or determination for the purpose of section 38. Each such withdrawal would pro tanto reduce the corpus and future income of the trust fund, but the settlement would continue to subsist and no "provision" of the settlement could be said to have become determined, in whatever sense that word should be interpreted. It is, however, expressly provided by clause 5 of the settlement that any sum authorized to be withdrawn should, from the time of the relevant declaration by the trustees, "thenceforward be held in trust for the settlor absolutely and thereupon the trusts hereinbefore declared concerning the part of the trust fund or the property to which such declaration relates shall forthwith determine and the trustees shall thereupon transfer such part of the trust fund or the property to which such declaration relates to the settlor absolutely."

The settlor was only in her early fifties when the settlement was executed and it was not impossible, nor is it impossible now, that if the trustees exercised to the full their powers under clause 5 of the settlement the whole of the trust fund might, during her lifetime, become subject exclusively to the trusts for Lady Kenmare to which I have just referred. Such a contingency cannot be said to be likely having regard to the size and value of the settled fund, but it is not outside the range of possibility. If it had not been for the proviso to clause 5 (a) the trustees could have made a declaration as to the whole fund at any time and held it on trust for Lady Kenmare. Had such an unqualified power been vested in the trustees it could scarcely be doubted, in my judgment, that it would have been within section 38 (2).

The settlor challenges this and says that the settlement and every provision thereof would remain unrevoked and undetermined even though such a power had been conferred and exercised. If this be the true view it would be no difficult matter to escape the provisions of the subsection altogether. In my opinion, however, it is not the true view. An unqualified power such as I have mentioned would have enabled the trustees wholly to determine the trusts of clause 3 of the settlement (which are the trusts in favour of the settlor's issue), for if there is no property there can be no trust.

Accordingly, the trustees would have had power to determine, viz., to bring to a termination, a "provision" if the meaning of "clause" be attributed to that word; namely, the provision of the settlement in favour of the issue. Alternatively, the trustees would have had power to determine the "provision" made by the settlement in favour of the issue if that word in section 38 (2) was intended to mean "the result ensuing from "that which is provided by a written instrument or part of it." By reason of the proviso to clause 5 (a) the trustees cannot at any time while the settlor is alive make a declaration as to the whole trust fund; but as the successive declarations which they are empowered to make may eventually divert the whole fund to the settlor, and as the relevant statutory language is "has or "may have power, whether immediately or in the future," the position is the same, in my opinion, for relevant purposes, as though the proviso had been omitted. Accordingly, whether or not the power which the trustees have is a power to determine the settlement as a whole, which I think it probably is, it is, in my judgment, at least a power to determine clause 3 of the settlement and the benefits provided for the issue of that clause and is accordingly within section 38 (2) of the Act of 1938.

The settlor then submits that the settlement is not within section 38 (2) because Parliament has no jurisdiction to lay a charge of tax on a non-resident person in respect of income to which that person is not entitled. It is not disputed that Parliament could do so, but it is suggested that clearer language than that found in the Act of 1938 would be required before the court would be justified in attributing so improbable an intention to the legislature; and that there are, in fact, indications in the Act itself which tend strongly to negative any such intention. In support of his general proposition Mr. Talbot placed much reliance on an observation made by Lord Macmillan in his speech

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in *Perry v. Astor*.¹⁴ In the course of his opinion Lord Macmillan cited the hypothetical case of an irrevocable disposition to an American trustee of American stocks and shares by a person resident in America, under which the income is payable to a person resident in this country, and after considering some of the results of such a case he said: "Incidentally one asks how a British Income Tax Act can impute to an American citizen 'for the purposes of the enactments relating to (British) income tax (including super-tax)' an income of which the American citizen has by the law of his own country effectually divested himself."

Mr. Talbot sought to apply that observation to the present case, but certain considerations exist which deprive this point of a good deal of its force. *Perry v. Astor*¹⁵ was before the House of Lords in 1935 and was decided upon section 20 of the Finance Act, 1922. This section was replaced by section 38 of the Act of 1938, and it may be supposed that the latter section received a good deal of consideration in its drafting and that the draftsman of this and the other relevant provisions had well in mind the decision in *Perry v. Astor*,¹⁵ and the speeches of the noble and learned Lords in that case. In particular the point to which Lord Macmillan referred was dealt with by the concluding part of section 41 (4) (a) of the Act; the effect of which, as applied to the present case, is that had the investments comprised in Lady Kenmare's settlement been American investments instead of stocks and shares in the United Kingdom, the income of such investments would not have been "income arising under" the settlement for the purposes of section 38 (2).

It is further to be observed that the improbability of an intention to tax in Lord Macmillan's illustration would obviously be greater where the relevant funds are abroad than where they are situate in this country and earning income here. Nevertheless, Mr. Talbot contends that, in view of a general principle which emerges from what Lord Macmillan said, the court should lean against a construction of section 38 which would result in taxing Lady Kenmare in the circumstances of this particular case. As ancillary to the broad proposition to which I have referred the case was put on behalf of the settlor in two somewhat different ways. First, it was said that, quite apart from putting any gloss on any particular word in section 38, when one takes the section along with the Third Schedule to the Act it becomes manifest that Parliament, duly observing the limitation of jurisdiction to

¹⁴ 19 T.C. 255, 286.¹⁵ Ibid. 255.

which Lord Macmillan referred, could not have intended that the section should operate in the case where a settlor was not resident in this country, and where recovery of tax in the way for which provision is made by the schedule, viz., in the courts of this country, could not be effected. The whole machinery, it is contended, for the recovery of tax by the person charged from the trustees of the settlement, or other person to whom income arises under the settlement, breaks down in the case of a foreign settlement; and when one finds that no equivalent or other machinery which is suited to the case of such a settlement is provided by the Act, the inference must be that the legislature was not intending to deal with foreign settlements such as that now in question at all.

' At first sight there seems force in this, but even if it were founded upon a right assumption I do not think, upon further examination, that it should succeed. If a taxing statute clearly imposes a liability on A and at the same time gives him a remedy over against B, I think the liability would still subsist even though it should transpire that in A's particular case he could not enforce his remedy against B. By Part I of the Third Schedule to the Act of 1938 Lady Kenmare is given the right of recovery therein mentioned and nothing can deprive her of it. But Parliament does not guarantee that that right will be effective. What is given is, as I think Mr. Stamp suggested, a *de jure* right and not a *de facto* right. The effectiveness or otherwise of the right cannot govern liability to assessment; for, if it did, all kinds of matters would have to be inquired into, including the point of time at which the enforceability of the right falls to be considered; and in this connexion it will be noted that the right to recover does not arise until after the settlor has paid the tax and this will not be until after the assessment has been made.

Apart altogether, however, from these considerations, I am by no means satisfied that Lady Kenmare could not enforce her statutory right of recovery in the courts of this country. The only difficulty in her way would be that the relevant defendant would probably be outside the jurisdiction, but our procedural law gives adequate facilities for service upon parties who are resident abroad. I accordingly do not think that the settlor has succeeded in showing that a narrow interpretation should be given to section 38 because of considerations founded upon the Third Schedule to the Act.

The second way in which Mr. Talbot put his case was to submit that the word "settlement" in section 38 (2) should be

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confined in its meaning to a settlement which takes effect, and is enforceable, under the law of the United Kingdom. It is quite clear that in some cases where language of apparent generality is found in a statute, some limitation has perforce to be placed upon it; and *Colquhoun v. Heddon*¹⁶ and *Camille and Henry Dreyfus Foundation Inc. v. Inland Revenue Commissioners*,¹⁷ to which Mr. Talbot referred us, are instances of this being done. I am unable, however, to see any sufficient reason to adopt the narrow construction of the word "settlement" in section 38 for which the settlor contends. It seems clear from section 41 that the legislature was contemplating the possibility of settlors being domiciled abroad; and when it is remembered that it is an inherent feature of our income tax code that foreign income which is sent here is taxable, there would appear to be no ground for assuming that when the word "settlement" is used in a taxing Act it means only a settlement which is within the jurisdiction of our courts. Finally, the extremely wide scope of the definition of the expression "settlement" in section 41 of the Act of 1938 disposes, as it seems to me, of the settlor's contention on this point.

As, therefore, the assessment of which Lady Kenmare complains was justified by the relevant language of the Finance Act, 1938, and as I can see no warrant for attributing an artificial construction to that language, I agree with Danckwerts J. in thinking that the assessment was rightly made and I would dismiss the appeal.

Appeal dismissed.

Leave to appeal to House of Lords.

Solicitors: *Theodore Goddard & Co.; Solicitor of Inland Revenue.*

A. W. G.

¹⁶ (1890) 25 Q.B.D. 129; 6 T.L.R. 331; 2 T.C. 621.

¹⁷ [1956] A.C. 39; [1955] 3 All E.R. 97; 36 T.C. 126.

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Revenue — Income Tax — Settlement — Revocability — Power to apply capital for benefit of settlor's wife — Capital not to be reduced below £100 — Power "to revoke or otherwise determine settlement or any provision thereof" — Meaning of "provision" — Finance Act, 1938 (1 & 2 Geo. 6, c. 46), s. 38 (2).

The trustees of a settlement had power thereunder during an "appointed period" to apply any part of the capital of the trust funds for the benefit of a specified class including the settlor's wife, with a limitation that the capital of the trust funds should not be reduced below £100. After the appointed period the funds remaining were to be held on trust for the settlor's next-of-kin. For the year 1951-1952 the settlor was assessed, under section 38 (2) of the Finance Act, 1938,¹ to surtax on the income from the property comprised in the settlement:—

¹ Finance Act, 1938, s. 38:

"(1) If and so long as the terms of any settlement are such that—
 "(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement;
 "or (b) the settlor or the wife or husband of the settlor may, whether immediately or in the future, cease, on the payment of a penalty, to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement;
 "any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year. . . . Provided that, where any such power as is referred to in paragraph (a) of this subsection cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable, and the like annual payments

"are payable in each year throughout that period, the said paragraph (a) shall not apply so long as the said power cannot be exercised.

"(2) If and so long as the terms of any settlement are such that—
 "(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof; and (b) in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised; any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income, as the case may be, shall be treated as the income of the settlor for that year. . . .
 "Provided that, where any such power as aforesaid cannot be exercised within six years from the time when any particular property first becomes comprised in the settlement, this subsection shall not apply to income arising under the

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Held, (1) that the words "any provision of the settlement" in section 38 (1) (a) and (b) meant a clause or section in the document; the same meaning ought to be given to the word "provision" throughout the section.

(2) That, inasmuch as during the lifetime of the settlor at least £100 must always remain subject to the operation of the trusts of the settlement the trustees had no power to determine the settlement or any provision thereof, and section 38 (2) of the Act of 1938 had no application.

Per Romer L.J. It is immaterial whether "provision" is to be construed as a clause or as a benefit conferred by the settlement. The beneficial interest provided for the next-of-kin is in no way affected by the exercise of the power conferred on the trustees during the appointed period, although such exercise diminishes the value of the fund which the next-of-kin would otherwise have taken. In other words, withdrawals of capital quantify the beneficial interest, but do not determine it.

Berkeley v. Berkeley [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154 considered.

Inland Revenue Commissioners v. Kenmare, ante, p. 483, distinguished.

Decision of *Wynn-Parry J.*, ante, p. 283; [1955] 3 All E.R. 274 reversed.

APPEAL from *Wynn-Parry J.*²

On July 25, 1951, the plaintiff, Henry Arthur Waldron Saunders, made a settlement of £100 for the benefit of a specified class, which included the settlor's wife. In August of the same year he transferred a further £25,000 to the trustees of the settlement, making a total fund of £25,100 which was subject to the trusts of the settlement. The trustees invested the £25,000 and the £100 was left uninvested. In the year ended April 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d. and an additional assessment to surtax for that year was made on the settlor in the sum of £4,167. Against that assessment the settlor appealed to the Special Commissioners, the question for determination being the application of section 38 (1) and (2) of the Finance Act, 1938, to the settlement.

Clause 1 of the settlement provided that the trustees thereof should invest £100 (which the appellant transferred to them on July 25, 1951), and any further sum or sums which the appellant might thereafter transfer to the trustees in or on authorized investments with power to vary the investments. Clause 2 defined "the trust funds" as including the said £100 and any

"settlement from that property, or
"from property representing that

"property, so long as the power
"cannot be exercised."

² Ante 283; [1955] 3 All E.R. 274.

further sum or sums which the appellant might transfer to the trustees, and provided that the trustees should hold the trust funds on the trusts and subject to the powers and provisions thereafter declared and contained. Clause 3 provided that during an "appointed period" the trustees should pay, divide or apply the income of the trust funds (less any portion thereof the capital whereof should have been appointed under clause 4 of the settlement) to or between or for the maintenance, support or benefit of any one or more to the exclusion of the other or others of a specified class as the trustees should in their absolute discretion determine. Clause 4 provided: "It shall be lawful for the trustees at any time or times during the appointed period but subject to the consent in writing of the settlor [the appellant] during his life and thereafter at their absolute discretion to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more to the exclusion of the other or others of the specified class freed and released from the trusts concerning the same provided always that during the life of the settlor any exercise by the trustees with such consent as aforesaid of the power in this clause contained shall be subject to the limitation that the capital of the trust funds remaining subject to the trusts of this settlement immediately after such exercise shall be of a value of not less than £100."

Clause 5 provided: "At the expiration of the appointed period the trustees shall hold the trust funds or so much thereof as shall remain subject to the trusts hereof for such person or persons as would under Part IV of the Administration of Estates Act, 1925, have become entitled to the trust funds at the death of the settlor if he had died absolutely entitled to the trust funds intestate a widower and domiciled in England and his death had occurred immediately before the death of the last survivor of the specified class now living, such persons, if more than one, to take the same respective shares and interests in the trust funds as they would have taken under the said Part IV of the said Act in the events aforesaid."

The commissioners held that the £100 and the £25,000 were comprised in one settlement and that the trustees' power, by virtue of clause 4 of the settlement, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of all or any one or more of the specified class, with a limitation that the capital of the trust funds should not be reduced below £100, was a power to determine a "provision" of the settlement

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in the sense of the second of the two meanings given to the word "provision" by Lord Simonds in *Berkeley v. Berkeley*,³ namely, "the result ensuing from, that which is provided by, a written instrument or part of it." They held also that the appellant's wife, in the event of the exercise of the discretionary power by the trustees, might become entitled to part of the property comprised in the settlement. For those reasons they held that the appeal failed, but they reduced the additional assessment for the year 1951-1952 to £4,153.

Wynn-Parry J., to whom the settlor appealed, also dismissed the appeal, holding that the word "provision" in section 38 (2) meant a benefit conferred by the settlement, as the surrounding language was inapt if taken to refer to a defined part of the section.

The settlor further appealed.

Graham-Dixon Q.C. and *A. P. L. Barber* for the settlor. There is no power to revoke or terminate this settlement, and the question for determination is whether the word "provision" in subsection (2) of section 38 means a part or term of the settlement, or, as the judge has held, a financial benefit flowing from the settlement. The settlor contends that the word can only mean a written clause of the document. The case is being tried on the footing that there is one settlement concerning the two sums of £25,000 and £100. The schedule sets out the list of persons included in the specified class of beneficiaries, and the first person named is the wife of the settlor, but there is no mention of "widow." Yet the power of the trustees under clause 4 to appoint the whole of the trust in their absolute discretion is only exercisable after the settlor's death. "Provision" in subsection (2) must have the same meaning as it has in subsection (1). That was admitted by the judge, but he said that he did not have to consider subsection (1) because he was convinced of the meaning of subsection (2). "Provision" in subsection (1) can only have reference to a written clause in the settlement, and to give it the meaning given by the judge to subsection (2) would make the subsection mere gibberish. In *Wolfson v. Inland Revenue Commissioners*⁴ the House of Lords held that "provision" meant term or clause. The judge said in his judgment that unless he was right in his decision, then the proviso to the subsection could have no meaning. He gave no reasons for that observation, and it is submitted that the proviso can have full

³ [1946] A.C. 555, 580; 62 T.L.R. 478; [1946] 2 All E.R. 154.

⁴ (1949) 31 T.C. 141; 65 T.L.R. 260; [1949] 1 All E.R. 865.

effect if "provision" is given the meaning for which the settlor contends. If the trustees exercised the power conferred by clause 4 of the settlement they would not be revoking a provision of the settlement but paying or applying part or parts of the capital as in that clause provided. There is nowhere in the settlement a power to determine the settlement within the meaning of subsection (2). *Berkeley v. Berkeley*⁵ is distinguishable.

Geoffrey Cross Q.C., Sir Reginald Hills and E. Blanshard Stamp for the Crown. It was contended for the settlor that under clause 4 of the settlement only the trust fund less £100 can go to the wife of the settlor during his lifetime. That is a surprising result which is accentuated by reason of paragraph (b) of section 38 (2). It is a wholly capricious construction and there seems to be no reason for it. The distinction between the two possible meanings of "provision" is put by Lord Porter and Lord Simonds in *Berkeley v. Berkeley*.⁶ The decision of the House of Lords in that case shows that a word may have two different meanings in the one Act. The words "determine a settlement" mean a power to put an end to something achieved by the settlement. If the court feels any doubt about the decision in this case it should give the Revenue the benefit of the doubt by reason of the odd results which would follow an acceptance of the settlor's construction.

Graham-Dixon Q.C. in reply. The judgment of the judge is defective, in that he accepted the argument that "provision" meant the same thing in different subsections; having found that "provision" must bear the same meaning in subsection (1) and subsection (2) he did not apply that finding. *Berkeley v. Berkeley*⁷ was not a case on the construction of the Act of 1938.

Cur. adv. vult.

June 11. The following judgments were read.

SINGLETON L.J. This is another case arising under section 38 of the Finance Act, 1938, which deals with settlements under which any person "has or may have power, whether immediately "or in the future . . . to revoke or otherwise determine the settlement or any provision thereof." It is said on behalf of the commissioners that the settlement made by Henry Arthur Waldron Saunders on July 25, 1951, is such a settlement and

⁵ [1946] A.C. 555; 62 T.L.R. 478;
[1946] 2 All E.R. 154.

⁶ [1946] A.C. 555, 575, 580.

⁷ [1946] A.C. 555.

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that in the event of the exercise of the power given to the trustees of the settlement, the wife of the settlor may become entitled to the whole or part of the property then comprised in the settlement, or of the income arising from the whole or part of it, and that thus the income falls to be treated as the income of the settlor for the year of assessment, 1951-1952. The decision of the special commissioners that the taxpayer's appeal failed was upheld by Wynn-Parry J. on July 27, 1955. The taxpayer appeals to this court.

The settlement is made between the settlor of the one part and his son, wife, and solicitor of the second part. The recital provides: "Whereas the settlor is desirous of making such "irrevocable provision as is hereinafter contained for the benefit "of the specified class (the meaning of which expression is set out "in the schedule hereto) and for the purpose of effectuating such "desire has transferred to the trustees the sum of £100 . . ." [His Lordship read clauses 1 to 5 of the settlement, which are set out above, and continued:] The only other part of the settlement to which I need refer is the schedule, in which there is a definition of the expression "the specified class," which embraces (a) the wife of the settlor, (b) the issue of the settlor, (c) the spouses, widows and widowers of any issue of the settlor, and many others.

The sum of £100 was transferred by the settlor to the trustees on the date of the settlement. A further sum of £25,000 was transferred to them by the settlor on August 13, 1951. £25,000 was invested by the trustees in ordinary shares in H. A. Saunders, Ltd.: £100 remained uninvested. In the year ending April 5, 1952, the gross income arising under the settlement was £4,166 13s. 4d.

The decision of the special commissioners is stated in this way, and I read from paragraph 7 (2), (3) and (4) of the case: "7. We the commissioners who heard the appeal gave our "decision in writing as follows:— . . (2) It being accepted by "the Crown that the deed of settlement contains no power to "revoke or otherwise determine the whole of the settlement made "thereunder, the issue before us resolves itself into the question "whether the terms of that settlement are such that the trustees "have power to revoke or otherwise determine 'any provision "'thereof.' Lord Simonds pointed out in *Berkeley v. Berkeley*¹ "that the word 'provision' is a word of diverse meanings which "slide easily into each other. It may mean a clause or proviso,

¹ [1946] A.C. 555, 580; 62 T.L.R. 478; [1946] 2 All E.R. 154.

" a defined part of a written instrument. Or it may mean the
 " result ensuing from that which is provided by a written instru-
 " ment or part of it.

" We have come to the conclusion that there is nothing in the
 " terms of the statutory provisions of which the phrase in question
 " forms part to constrain us to adopt a limited meaning of the
 " word 'provision.' The word being wide enough to embrace the
 " result ensuing from a written instrument, we do not feel justi-
 " fied in excluding that meaning.

" (3) By virtue of clause 4 of the deed of settlement the
 " trustees have power, subject to certain conditions, to pay or
 " apply any part or parts of the capital of the trust funds to or
 " for the benefit of all or any one or more of the specified class as
 " defined in the schedule to the deed, with the limitation that
 " the capital of the trust funds shall not be reduced below £100.
 " This power of the trustees to remove from the settlement the
 " whole of the property save £100 seems to us quite clearly to
 " be a power to determine a provision of the settlement in the
 " sense of the second of the two meanings given by Lord Simonds.
 " The settlor's wife is a member of the specified class referred to
 " and in the event of the exercise of the discretionary power of
 " the trustees she may become entitled to part of the property
 " comprised in the settlement.

" (4) For these reasons we hold that the appeal fails."

That is supported by the judgment of Wynn-Parry J. Uphold-
 ing the decision of the special commissioners the judge said²:
 " It appears to me that the problem is to be solved by considering
 " the phrase 'to revoke or otherwise determine the settlement or
 " 'any provision thereof.' If the word 'provision' meant only
 " a clause or proviso, a defined part of a written instrument, it
 " would have been unnecessary to include in the subsection the
 " words 'or otherwise determine,' for the use of the verb 'revoke'
 " would have sufficed, that being from the conveyancer's point
 " of view the natural word to use, whether the revocation was to
 " cover the whole of the settlement or only specific parts of it.
 " The word 'determine' appears to me to be an inapt word to
 " use where the object is to provide a power to bring to an end
 " the operation of a defined part of a written instrument. On
 " the other hand, I must, if I can, give effect to the words 'or
 " 'otherwise determine,' because they are clearly put in
 " deliberately for the purpose of achieving something further than
 " the word 'revoke' alone. The word 'determine' seems to

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² Ante 283, 289; [1955] 3 All E.R. 274.

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“me to be an apt word to use where the power contemplated is to bring to an end some benefits provided by the settlement. As Mr. Cross, for the Crown, pointed out, that construction is, I think, reinforced by the proviso to section 38 (2), which it is difficult to see as having any operation at all without it. Looking, therefore, merely at the subsection, and neither helped nor embarrassed by authorities, I should come to the conclusion that the decision of the special commissioners was correct. I can see nothing in the language of section 38 (1), or in the authorities cited on problems arising under that subsection, which would prevent the construction which I have placed on subsection (2) being placed on the language of subsection (1).”

Section 38 (2) of the Finance Act, 1938, contains somewhat drastic provisions as to income arising under certain settlements. If the settlement is one to which subsection (2) (a) and (2) (b) apply, “any income arising under the settlement from the property comprised in the settlement in any year of assessment or from a corresponding part of that property, or a corresponding part of any such income . . . shall be treated as the income of the settlor for that year and not as the income of any other person.”

The question for determination arises under subsection (2) (a) and, in particular under the words “or any provision thereof.” Subsection (2) provides: “If and so long as the terms of any settlement are such that—(a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provisions thereof . . .” It was urged on behalf of the settlor that in this context the word “provision” can only mean a written clause in the document. For the Crown it was submitted by Mr. Cross that “provision” in section 38 (2) means the result ensuing from that which is provided by a written instrument or part of it: that one cannot determine a document while one can determine a provision made for someone, and it was claimed that the word “provision” as used in the section had different meanings—indeed, that it had different meanings in the two places in which it is used in subsection (1) (a). It was not suggested that there was any power to revoke the settlement or any provision thereof.

In *Berkeley v. Berkeley*³ there are passages upon the meaning of the words “any provision, however worded” in section 25 (1) of the Finance Act, 1941. Viscount Simon said⁴: “The

³ [1946] A.C. 555.⁴ *Ibid.* 565, 566.

“ crucial question is what is the meaning of the phrase ‘ any
 “ ‘ provision, however worded.’ It may mean, as the Court of
 “ Appeal thought, the words which define a benefit and which
 “ are contained in the document or oral contract referred to in
 “ the section. Or it may mean the benefit conferred by such a
 “ document or oral contract. If it bears the first of these mean-
 “ ings, it is to be found in the language of the document or oral
 “ contract and is necessarily of the same date, being in effect
 “ equivalent to a clause. If it means the second, its date will be
 “ the date when the benefit is conferred. Either meaning is
 “ possible in construing para. (a) and para. (c) of the section,
 “ but I am forced to the conclusion that only the second meaning
 “ is possible when construing para. (b), and if this is so in con-
 “ struing para. (b), the same meaning must be given to the words
 “ when applying para. (a) and para. (c). Thus, ‘ any provision,
 “ ‘ however worded ’ must be understood in all cases to refer to
 “ a benefit conferred and not to the words conferring it.” I draw
 attention to the necessity of reading the words in the same sense
 throughout the section.

Lord Porter, in a dissenting speech, said ⁵: “ It is true that
 “ the word ‘ provision ’ has more than one meaning. It may be
 “ used to indicate the thing provided or the words by which pro-
 “ vision is made, and it was urged that in this section it bore
 “ the first meaning. It was, it was said, ‘ made ’ when it came
 “ into operation; until then it was but inchoate. No doubt it was
 “ contained in the second codicil, but it was not made until the
 “ testators’ death. The argument is attractive, but takes, I think,
 “ too technical a view. ‘ Provision ’ in the section appears to be
 “ used in the second sense mentioned above. The expressions
 “ ‘ however worded,’ ‘ stated amount,’ ‘ contained in ’ all seem to
 “ point to the language rather than what the language brings
 “ about. The Court of Appeal so thought in *In re Waring*,⁶ and
 “ I agree with their view.”

Lord Simonds said ⁷: “ That the section is not very artistically
 “ drawn I would be prepared to agree. In particular, little skill
 “ is shown in the use of the word ‘ provision.’ That is a word of
 “ diverse meanings which slide easily into each other. It may
 “ mean a clause or proviso, a defined part of a written instrument.
 “ Or it may mean the result ensuing from, that which is provided
 “ by, a written instrument or part of it. Our section opens with

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⁵ [1946] A.C. 575.⁷ [1946] A.C. 555, 580.⁶ [1942] Ch. 426; 58 T.L.R. 367;

[1942] 2 All E.R. 253.

C. A. " the words ' subject to the provisions of this section ' and in this
 1956 " phrase either or both of the meanings I have given may be
 SAUNDERS " intended. Then comes the phrase ' provision, however worded,'
 v. " where the first meaning would seem more apt, though the second
 INLAND " is well enough. Thirdly, the word is used in the context of
 REVENUE " (a) ' contained,' (b) ' made ' and (c) ' varied,' and here though
 COMMISS- " either meaning is appropriate to (a) or (c) it is the second mean-
 SIONERS. " ing only which is appropriate to (b). I have said enough to
 Singleton L.J. " show that it is not safe to build upon the fine shades of meaning
 " of the word ' provision,' but the balance is, I think, in favour of
 " giving to the expression ' being a provision which was made
 " ' before ' the second meaning that I have indicated. For one
 " does not speak of ' making ' a provision, if by provision one
 " means a clause or section."

Mr. Graham-Dixon drew our attention to two short passages from the report in the House of Lords in *Inland Revenue Commissioners v. Wolfson*.⁸ The first citation he made is from the speech of Lord Normand.⁹ The learned Lord said: " But a power to ' revoke or otherwise determine the settlement ' or a term thereof points rather to a power to be found within the settlement than to a power to be found in external circumstances." A passage in the speech of Lord Morton was also cited to us.¹⁰

I feel satisfied that the words " of any provision of the settlement " at the end of section 38 (1) (a) and in section 38 (1) (b) mean a clause in the document, as I have said in my judgment in *Inland Revenue Commissioners v. Kenmare*.¹¹ The word " provision " ought to be given the same meaning throughout the section. For this reason I do not accept the submission of Mr. Cross.

A person who is given power to revoke a settlement or any provision thereof may do so by a document in writing. If he is also given power to determine the settlement, or any provision thereof, one way in which he can do that (assuming the power) is by taking away the whole of the settled fund, or the whole of the settled fund available for the purposes of the particular provision. That would be a determination. The power of trustees to pay out, or to withdraw, a part—I emphasize " a part "—of the capital fund is not a determination of the settlement or of any provision

⁸ 65 T.L.R. 260; [1949] 1 All E.R. 865; sub nom. *Wolfson v. I. R. C.*, 31 T.C. 141.

⁹ 31 T.C. 141, 170.

¹⁰ Ibid. 171, 172.

¹¹ Ante 493.

thereof: it is something envisaged by the terms of the settlement. The balance remains subject to the trusts of the settlement.

In the case under appeal the trustees are given power by clause 4 to make payments of capital (subject to the consent of the settlor during his life) to persons within the specified class so long as the capital of the settled fund does not fall below £100 during the settlor's lifetime. The result is that, with the necessary consent, they may make payments out of £25,000, retaining only £100. It looks somewhat strange. Still, I cannot see that in principle there is any difference between such a case and one the other way round in which there is power to pay out only £100, so as not to reduce the capital below £25,000. It is obviously an effort to get round section 38 (2) of the Act.

In the circumstances of this case there was not, in my opinion, power to revoke or to determine the settlement or any provision thereof. I would allow the appeal.

MORRIS L.J. The question raised in this appeal is whether section 38 of the Finance Act, 1938, applies to a settlement made by the appellant on July 25, 1951. The settlor transferred the sum of £100 to the trustees on the day that the settlement was made. The settlor had the power but not the obligation to transfer further sums to the trustees. The settlor did, in fact, transfer a further sum of £25,000 to the trustees on August 13, 1951. The power of the trustees to release capital pursuant to clause 4 is subject to the limitation that, during the life of the settlor, the remaining capital of the trust funds, after any exercise of the power, must be of a value of not less than £100.

It does not seem to me that it can be said in this case that there is any power either to revoke or to determine the settlement during the lifetime of the settlor. The question which arises is whether there is in that period a power to determine any "provision" of the settlement. This raises the issue as to what the word "provision" means. In my judgment in *Lady Kenmare's* case¹² I expressed my opinion that there was in that case a power to determine the settlement. I further expressed my views as to the meaning in the context of section 38 (2) of the word "provision." I do not repeat what I there expressed. Mr. Graham-Dixon referred to the speeches in the House of Lords in *Wolfson v. Inland Revenue Commissioners*.¹³ Though no occasion there arose for submissions in regard to, and considered opinion in

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¹² Ante 499.

¹³ 31 T.C. 141

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regard to, the meaning of the word "provision," it is of importance to note the way in which the word was read by Lord Normand¹⁴ and by Lord Morton.¹⁵

In the present case it is to be noted that the "trust funds" comprise the sum of £100 and any further sum or sums which the settlor might later transfer and the investments for the time being representing the same or any augmentations and additions and accretions. But it was not the income from the whole of the trust funds that would go, under clause 3, to one or more of the members of the specified class. It was the income from the trust funds "less any portion thereof the capital whereof" "shall have been appointed under the provisions" of clause 4. Similarly, what the trustees were, at the expiration of the appointed period, to hold for certain persons pursuant to clause 5 were the trust funds "or so much thereof as shall remain subject" "to the trusts." But clause 4 limited the power of applying capital during the life of the settlor so that trust funds should remain which should be "of a value of not less than £100." If no further sums had been or were to be transferred, but if the original £100 had been invested and if the investments had appreciated there could still be application of capital under clause 4 always provided that during the life of the settlor trust funds remain which immediately after the exercise of the power are of a value of not less than £100. Therefore, the problem which arises does not arise merely because of the power of the settlor to transfer further sums to the trustees.

After the death of the settlor but during the appointed period there would not seem to be any limitation imposed upon the trustees in exercising their power to apply any part or parts of the capital to or for the benefit of one or more members of the specified class: if all was applied then all the capital would be freed and released from the trusts. The operation of clause 3 would then come to an end. Clause 5 would never come into operation. It seems to me, therefore, that the trustees will have power in the future to determine the settlement. They will also, I consider, have power in the future to determine a "provision" of the settlement, whether the word "provision" is used to denote that which is provided or to denote a clause or part of the settlement deed or agreement. The terms of section 38 (2) (a) are, therefore, in my judgment, satisfied. But these unlimited powers cannot be exercised during the lifetime of the settlor and so neither he nor his wife can in the event of the exercise of these

¹⁴ 31 T.C. 170, 171.¹⁵ Ibid. 172.

unlimited powers become beneficially entitled. The terms of section 38 (2) (b) are, therefore, not satisfied. If, therefore, the period after the death of the settlor is considered, the provisions of section 38 (2) do not apply.

It is next necessary to consider the position in the period of the lifetime of the settlor. If during that time the trustees apply capital pursuant to their powers under clause 4 they must leave capital of a value of not less than £100. They could exercise their power so that the settlor's wife became to some extent beneficially entitled. Section 38 (2) (b) would, on this footing, be satisfied. The real question which, therefore, arises in this appeal is whether the power which the trustees may exercise during the settlor's lifetime comes within the words of section 38 (2) (a). The power would certainly not be one either to revoke or to determine the settlement. But would the exercise of the power determine a "provision" of the settlement? It seems to me that clause 5 of the settlement would not be affected. So also the operation of clause 3 of the settlement would not be affected if capital were withdrawn. The clause would merely operate in regard to less capital. If the word "provision" denotes a clause, then clause 3 would not be determined. But the Crown submit that the word "provision" refers to what is provided by or affected by the settlement; they submit that each £1 of the trust fund should be regarded as subject separately to the trusts so that the withdrawal of any capital is a determination pro tanto of the "provision" of the settlement. But clause 3 of the settlement only operates upon the trust funds less any portion thereof the capital whereof shall have been appointed under the provisions of clause 4: hence the "provision," even on the Crown's interpretation, must be the income on whatever trust funds there are. The submission of the Crown further fails if the word "provision" denotes, as in my judgment it does, a clause or part of the settlement deed or agreement.

For these reasons I consider that the case is not brought within the provisions of section 38 (2) and I would allow the appeal.

ROMER L.J. On this appeal, as in *Lady Kenmare's* case,¹⁶ a question arises as to the applicability of section 38 (2) of the Finance Act, 1938, to the income of a settlement. The settlement now in question was made on July 25, 1951, by H. A. W. Saunders,

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¹⁶ Ante 483.

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and it originally comprised only £100. A further £25,000, however, was brought into the settlement by Mr. Saunders on August 13, 1951, to be held upon the trusts thereof. Clause 3 of the settlement provided that during the period therein specified (which will in all probability last for a pretty considerable time) "the trustees shall pay divide or apply the income of the trust funds (less any portion thereof the capital whereof shall have been appointed under the provisions hereinafter contained) to or between or for the maintenance support or benefit of any one or more to the exclusion of the other or others of the specified class as the trustees shall in their absolute discretion determine." The "specified class" consists of a number of persons who were named in the Schedule to the settlement, one of whom is the settlor's wife.

By clause 5 of the settlement it is provided that "At the expiration of the appointed period the trustees shall hold the trust funds or so much thereof as shall remain subject to the trusts hereof" for the settlor's statutory next-of-kin as therein mentioned. Between clause 3 and clause 5 is inserted the clause upon which the Crown relies. It empowers the trustees at any time or times during the appointed period, but subject to the settlor's written consent during his lifetime, to pay or apply any part or parts of the capital of the trust funds to or for the benefit of any one or more of the specified class, freed and released from the trusts concerning the same; but subject to the limitation that, during the settlor's life, the capital of the trust funds remaining subject to the trusts of the settlement immediately after the exercise of the power should be of a value of not less than £100.

It is not contended for the Crown that under clause 4 the trustees have any power of revocation, but it is said that they have power to determine the settlement or a provision thereof during his lifetime in such a way that the whole trust funds (except £100) may become payable to the settlor's wife; and that, accordingly, section 38 (2) applies, with the result that for the purposes of surtax the whole income from the trust funds falls to be treated as Mr. Saunders' income, except such as is properly attributable to £100. This contention succeeded both before the special commissioners and before Wynn-Parry J. on appeal from them.

For my part I am unable to accept the contention of the Crown. The settlement has obviously been very carefully and skilfully drawn and, in my judgment, the draftsman has succeeded in saving the settlor in this case from liability to tax under section 38 (2). As

no question of revocation arises, no part of the income of the trust fund can be treated under the subsection as Mr. Saunders' income unless the trustees have power to determine the settlement or any provision thereof. Now, so long as any part of the fund remains in the hands of the trustees and subject to the operation of the trusts declared by clauses 3 and 5 respectively it cannot be said, in my opinion, that the settlement has been determined; and as at least £100 will always remain, during the settlor's lifetime, subject to the operation of those trusts, it follows that the trustees have no power to "determine" the settlement.

The question therefore narrows itself down to whether the trustees have power to determine any "provision" of the settlement. As in *Lady Kenmare's* case¹⁷ so in this, I find it unnecessary to come to any final view as to whether the word "provision" in section 38 (2) means "clause" or "result"; for in my judgment the trustees have no power under clause 4 of the settlement to determine in the lifetime of the settlor any part of the written instrument or any benefit which the settlement confers. Even if the trustees were to exercise the power which they are given to its uttermost neither clause 3 nor clause 5 of the settlement would be determined; for the former clause would continue during the settlor's lifetime to govern the income of the £100 which would still remain subject to the trusts of the settlement, whilst at the settlor's death the corpus of that sum would still be within the operation of the trusts declared by clause 5.

Can it then be said that any result or benefit deriving from clauses 3 or 5 would be determined if the trustees exercised their power to its fullest extent? It is true that each time capital was withdrawn under the power there would be less income in future available for the specified class and less capital available to the settlor's next-of-kin at the expiration of the appointed period. Under clause 3, however, the specified class are only given the income from such capital as is not withdrawn by the trustees under clause 4; the settlor has not provided any beneficial interest for them in the income of capital that is withdrawn and, therefore, any decrease of income which follows upon a withdrawal is due rather to the qualified terms in which the income was given than to the power conferred by clause 4.

Similarly, the beneficial interest of the statutory next-of-kin under clause 5 is expressly confined to so much of the trust

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¹⁷ Ante 503.

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funds as shall remain subject to the trusts of the settlement at the expiration of the appointed period; and I cannot see how that interest is in any way determined by the withdrawal of capital in pursuance of clause 4. The beneficial interest provided for the next-of-kin is, in my opinion, in no way affected by the exercise of the clause 4 power, although such exercise naturally diminishes the value of the fund which the next-of-kin would otherwise have taken; in other words, withdrawals of capital quantify the beneficial interest but do not determine it.

As, therefore, the trustees have no power, in my judgment, either to determine the settlement or any clause thereof or any beneficial result to which the settlement gives rise, the case does not, in my opinion, come within section 38 (2) of the Act. I accordingly agree that the appeal should be allowed.

Appeal allowed.

Leave to appeal to House of Lords.

Solicitors: *Henry Pumfrey & Son; Solicitor of Inland Revenue.*

A. W. G.

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May 1, 2,
3, 17.

Singleton,
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Revenue—Income tax—“Expenses of management”—Repayment of tax—Life assurance companies—Brokerage and stamp duties on purchase and sale of securities—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 33 (1); Sch. D, Cases I and II, r. 3.

Judicial Precedent—Ratio decidendi—Binding effect—Revenue.

Two life assurance companies paid tax on the income from their investments, not on their profits. The purchase, sale and changing of investments was part of their day-to-day business, and they claimed under section 33 (1) of the Income Tax Act, 1918,¹

¹ Income Tax Act, 1918, s. 33 (1):
 “Where an assurance company
 “carrying on life assurance business,
 “or any company whose business con-
 “sists mainly in the making of in-
 “vestments, and the principal part of
 “whose income is derived therefrom,
 “or any savings bank or other bank
 “for savings, claims and proves to
 “the satisfaction of the special com-
 “missioners that, for any year of
 “assessment, it has been charged to
 “tax by deduction or otherwise, and
 “has not been charged in respect of

repayment of sums disbursed as "expenses of management." The Crown objected to brokerage and stamp duties being included as such "expenses," and the Special Commissioners held that the claims failed in respect of those items. Harman J. dismissed appeals by the companies.

On appeal to the Court of Appeal:—

Held, affirming the decision of Harman J., that the ratio decidendi in *Capital and National Trust Ltd. v. Golder* (1949) 31 T.C. 265; 65 T.L.R. 772; [1949] 2 All E.R. 132, 956 (where brokerage and stamp duties payable by an investment company were held not to be allowable as expenses of management under section 33 (1)), was that expenses incurred by the management in carrying out the business of the company were not "expenses of management"; accordingly that case was indistinguishable from the present one and the court was bound to hold that the sums in question were not allowable as expenses of management.

Per Singleton L.J. Apart from the decision in *Golder's* case, I should have thought that the words "expenses of management" mean expenses properly incurred in the course of managing or conducting the business or, to put it another way, the expenses of running the business.

Golder's case (*supra*) applied.

CASES STATED by the Special Commissioners for the Purposes of the Income Tax Acts.

Under section 33 (1) of the Income Tax Act, 1918, the Sun Life Assurance Society and the Phoenix Assurance Co. Ltd. claimed repayment of income tax for the year of assessment 1949–1950 corresponding to sums disbursed as expenses of management for the year ended December 31, 1949. The claims were disallowed to the extent that either included disbursements in respect of brokerage and stamp duties.

The sole question raised was whether sums so paid or suffered in the year ended December 31, 1949, by the Sun Life Assurance

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"its profits in accordance with the
"rules applicable to Case I of
"Schedule D, the company or bank
"shall be entitled to repayment of so
"much of the tax paid by it as is
"equal to the amount of the tax on
"any sums disbursed as expenses of
"management (including commis-
"sions) for that year: Provided
"that—(a) relief shall not be given
"under this section so as to make
"the tax paid by the company or
"bank less than the tax which would
"have been paid if the profits had
"been charged in accordance with the
"said rules; . . ."

Sch. D, Cases I and II, r. 3:
"In computing the amount of the
"profits or gains to be charged, no
"sum shall be deducted in respect
"of—(a) any disbursements or
"expenses, not being money wholly
"and exclusively laid out or expended
"for the purposes of the trade, pro-
"fession, employment, or vocation:
"(b) any disbursements or expenses
"of maintenance of the parties, their
"families or establishments or any
"sums expended for any other domes-
"tic or private purposes distinct from
"the purposes of such trade, profes-
"sion, employment or vocation."

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Society, amounting to £40,773, and by Phoenix Assurance Co. Ltd., amounting to £62,806—which, less consequential reduction of foreign life fund restriction, was £59,183—were “expenses of “management” within section 33 (1). The Sun Life Assurance Society contended that the purchases and sales of stocks and shares giving rise to the payment of those commissions and stamp duties were a part of its ordinary day-to-day trading activities, and the stocks and shares so sold part of its ordinary trading assets; and that in those circumstances the case was distinguishable from *Capital and National Trust Ltd. v. Golder*,² where the stocks and shares purchased and sold were part of that company’s capital assets. Phoenix Assurance Co. Ltd. contended that, because investments representing the life fund constituted circulating capital of its trade, the case was distinguishable from *Capital and National Trust Ltd. v. Golder*,² or, alternatively, that that case was wrongly decided, and that, in any event, sums expended as brokerage and stamp duty in connexion with purchases and sales of investments were “sums disbursed as “expenses of management (including commissions)” within the meaning of section 33, and that the claim was correct in principle and amount and should be allowed.

The Crown, in the case of the Sun Life Assurance Society, contended that, on the authority of *Capital and National Trust Ltd. v. Golder*,² the sums in question were not expenses of management allowable under section 33. In the case of Phoenix Assurance Co. Ltd. it contended (a) that the sums in dispute were directly referable to each several purchase and sale of a holding of investments; (b) that, accordingly, they were to be treated as part of the cost, or as a reduction from the receipts of sale of each such purchase and sale; and (c) that, since those sums were necessarily paid in the course of those transactions of purchase and sale, they were, on the authority of *Capital and National Trust Ltd. v. Golder*,² not expenses of management within the meaning of section 33.

The commissioners found that each company, in the ordinary course and for the purpose of carrying on its business, had of necessity to purchase investments out of its premium income and from time to time, as occasion demanded, to sell or exchange those investments. With regard to the Sun Life Assurance Society, they found that the brokerage and stamp duties payable on the purchase of an investment, being expenses specifically referable to and only incurred by reason of the purchase, were expenses of

² (1949) 31 T.C. 265; 65 T.L.R. 772; [1949] 2 All E.R. 132, 956.

the purchase and not expenses of management; and that the brokerage and stamp duties paid by the society on the sale of an investment were not expenses of management; and, accordingly, that the claim to the £40,773 failed.

With regard to Phoenix Assurance Co. Ltd., the commissioners held that the company's life fund was specially segregated and invested and formed part of its circulating capital; that the sums in dispute which were necessarily paid in the course of the transactions of purchases and sales of investments were not expenses of management, being so closely linked to those transactions that they were expenses directly referable only to them; that the brokerage and stamp duties paid in connexion with the purchase of an investment were part of the cost of acquiring it, although they did not tend to enhance its value; that the expenses were part of the costs of the investment and not expenses of management and, accordingly, that the claim to the £59,183 failed.

The companies appealed.

Sir James Millard Tucker Q.C., L. C. Graham-Dixon Q.C. and John L. Creese for the Sun Life Assurance Society. These appeals, which raise the same point, ought to be allowed. For many years it has been held that, in the case of an insurance company which is "carrying on business" within the Income Tax Acts, the Crown has the option to assess the profits under Case I of Schedule D or to charge the company's total investment income with tax. In 99 per cent. of cases the Crown gets more by taking the latter course: *Revell v. Edinburgh Life Insurance Co.*³; *Simpson v. Grange Trust Ltd.*⁴ The expression "expenses of management (including commissions)" may derive from the First Schedule to the Assurance Companies Act, 1909. That Schedule prescribes forms of account for assurance companies to present to the Board of Trade every year; and "commission" and "expenses of management" are among the headings under which deductions fall to be made on the revenue account. That is strongly, if not conclusively, in favour of the Sun Life Assurance Society.

It has been held that discount granted on a premium is not a disbursement: *North British and Mercantile Insurance Co. v. Easson*⁵; that a holding company's loss on exchange on buying dollars to meet interest on bearer bonds payable in New York is

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³ (1906) 5 T.C. 221.

⁵ (1919) 7 T.C. 463, 471.

⁴ [1934] 2 K.B. 317; 19 T.C. 231.

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not an "expense of management": *Bennet v. Underground Electric Railways Co.*⁶; that advertising expenses could not be claimed as "expenses of management" under section 33 because they had been allowed under rule 8 of No. V of Schedule A: *Southern v. Aldwych Property Trust Ltd.*⁷; and that the expenses of re-arranging an investment company's loan capital are not an expense of management: *London and County Leasehold Properties v. Sweet.*⁸ Those decisions, though prima facie adverse to the Sun Life Assurance Society's contention, do not really affect it: each of them is a decision that a particular transaction or event was not a disbursement or an expense of management. The Sun Life Assurance Society founds itself on its original contention before the Special Commissioners that the brokerage and stamp duties on changes of investment are, in the circumstances, deductible as expenses of management, and that *Capital and National Trust Ltd. v. Golder*⁹ does not apply.

F. Heyworth Talbot Q.C. and *F. M. Young* for Phoenix Assurance Co. Ltd. Phoenix Assurance Co. Ltd. also rely on its contention before the Special Commissioners, and reiterate particularly the argument that *Capital and National Trust Ltd. v. Golder*⁹ is distinguishable from the present case or, alternatively, was wrongly decided.

Sir Reginald Manningham-Buller Q.C., A.-G., Roy Borneman Q.C. and *Sir Reginald Hills* for the Crown on both appeals. *Capital and National Trust Ltd. v. Golder*⁹ was correctly decided and is not distinguishable on its ratio decidendi from the present case. There the meaning of "expenses of management" was in question, as it is here. The word "expenses" must be given its ordinary meaning and cannot include either brokerage or stamp duties on stocks and shares. The appeals should be dismissed.

Sir James Millard Tucker Q.C., in reply, referred to *Simpson v. Grange Trust Ltd.*¹⁰ and *Bennet v. Underground Electric Railways Co.*¹¹

Cur. adv. vult.

1955. Nov. 2. *HARMAN J.* read the following judgment: These two appeals raise the same point, which is one of some importance in that it affects to a considerable degree the income

⁶ [1923] 2 K.B. 535; 39 T.L.R. 560; 8 T.C. 475.

⁷ [1940] 2 K.B. 266; 56 T.L.R. 808; 23 T.C. 707.

⁸ (1942) 58 T.L.R. 281; 24 T.C. 412; [1942] 2 All E.R. 212.

⁹ 31 T.C. 265; 65 T.L.R. 772; [1949] 2 All E.R. 132.

¹⁰ [1934] 2 K.B. 317; 19 T.C. 231.

¹¹ [1923] 2 K.B. 535; 39 T.L.R. 560; 8 T.C. 475.

tax liability of all the life assurance societies carrying on business in this country.

As is well known, the Crown has long had the option of charging a life assurance society to tax either under Schedule D or by taxing the income of the society's investments without regard to its annual profits. In fact such profits are not easily ascertainable year by year, and the Crown invariably takes advantage of its right to tax these companies on their investment income. The same principle has been applied in the case of what are known as investment companies, and their position is described by Sir Mark Romer L.J. in his judgment in *Simpson v. Grange Trust Ltd.*¹ As he observed, it was appreciated in 1915 that this method of taxation deprived the company of the right which it would otherwise have of deducting its expenses before suffering tax, and, accordingly, by section 14 (1) of the Finance Act, 1915, some relief was given. This section was reproduced by section 33 of the Income Tax Act, 1918, which is the section to be considered here, the relevant words being "sums disbursed as expenses of management (including commission) for that year." The provisos to subsection (1) are not here relevant.

From 1915 until 1949 companies coming within the section had always treated as expenses of management deductible under it the sums paid to brokers and the stamp duties on transfers of investments made in the ordinary course of business. In the year 1949-1950, with which these appeals are concerned, these two items amounted in the case of the Sun Life Assurance Society to over £40,000, and in that of the Phoenix to £62,000. Up to that year the Crown had always admitted similar claims of life assurance societies. The Crown had followed the same course in connexion with investment companies until the previous year when it had obtained, in *Capital and National Trust Ltd. v. Golder*,² a decision from the Court of Appeal that in the case of those companies these particular expenses, namely, brokerage and stamp duty on changes of investment, did not fall to be deducted as being expenses of management. Not unnaturally, the Crown seeks to extend this decision to the case of life assurance societies, and the question before me is whether it is entitled so to do.

What, then, are sums "disbursed as expenses of management" (including commissions)? The taxpayers suggest that the

¹ [1934] 2 K.B. 317; 19 T.C. 231.

² (1949) 31 T.C. 265; 65 T.L.R. 772; [1949] 2 All E.R. 132, 956.

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origin of these words is to be found in the Assurance Companies Act, 1909, where in the First Schedule to the Act, prescribing statutory forms of account which assurance companies have to lay before the Board of Trade in each year, two of the headings under which deductions fall to be made on the revenue account are (1) commission, and (2) expenses of management. It may very well be that this suggestion is correct, though it is to be remembered that section 33 of the 1918 Act applies to companies other than assurance companies. If, however, I accept it, I do not see that I am further on the road to ascertaining what the words mean when they appear in section 33 (1). The large majority of assurance companies when making their returns under the Act of 1909 do not include brokerage and commission on purchases and sales under expenses of management or commission. A minority, including the Sun Life Assurance Society, do, however, show both brokerage and stamps under the former head. The way in which the companies keep their books seems to me immaterial. The Crown, on the other hand, argued that these words were meant to give somewhat less relief than if the company were being assessed under rule 3 of Cases I and II of Schedule D of the 1918 Act. I do not find this at all helpful: rule 3 is not a relieving section, but the contrary. It merely says what may not be deducted. Section 33 is a relieving section and says what may be claimed by way of repayment.

The words are not a term of art and must, as it seems to me, bear their ordinary meaning. Looking at them first apart from authority I should suppose them to mean the expenses to which the company acting by its board of directors is put or the commission for which it becomes liable in managing the business of the society. This does not, of course, mean that the cost of the article in which the company trades can be included, but that the expense of buying or selling it may be. As I read the commissioners' decision, they conclude that both brokerage and stamp duty ought to be treated as part of the cost of purchase and sale and not expenses of management, either because they were necessarily incurred and paid in the course of the transaction of purchase or sale, or because they are not general expenses but expenses specifically referable to these purchases and these sales. I confess that I cannot follow this reasoning at all. As to the first, brokerage is no necessary part of the cost of purchasing or selling shares, operations which may be performed, and often are in the case of new issues, outside the Stock Exchange. As to the second, many other items

of expense are specifically so referable: for instance, stamps on policies, and legal costs of investigating titles on mortgage transactions. Again, the commissioners seek to distinguish between the management of the society's business and the carrying on of its business, and this is a distinction which I cannot see. In order to carry on the business you must manage it: the two functions are inseparable. If a man carrying on a draper's trade purchases a roll of cloth he will pay its cost to the wholesaler and probably a commission to the buyer. Neither of these is an expense of management (though the second is a commission) but everything else which the draper pays in connexion with the roll of cloth, namely, its transport to his shop and the various operations necessary to bring about its sale are, as it seems to me, expenses of management, though they are also doubtless expenses of the conduct of the business.

The course of life assurance business is described in the case stated and is not in issue. The purchase and sale of shares is a day-to-day activity essential to a life assurance company and vital to the carrying out of its objects, which are to maintain the life assurance fund, to provide the assured with his covenanted money, and to produce profits wherewith to pay bonuses to policy holders and dividends to shareholders. This day-to-day activity in practice involves the services of brokers. It also involves the services of solicitors where real estate or mortgage transactions are in question. I cannot see that the charge for the services of the brokers is any different from the charge for the services of the solicitors or the wages of the clerk who enters the transaction in the books, or the salary of the skilled member of the staff who advises on the purchase or sale.

I do not feel the same confidence about stamp duties. These are disbursements no doubt in a sense, but they are imposed by the State by way of taxation and may truly be said to be part of the cost of each transaction to the company and be treated as such. If there were no authority I would therefore allow the appeal, at any rate as regards brokers' fees, holding them to be expenses of management. I may say that neither side argued that the words in brackets "including commissions" applied to these fees.

In revenue matters, however, the court is rarely free from the shackles, or perhaps I should say deprived of the help, of authority. I turn then to examine the authorities said to cover the point. The earliest case cited to me was *North British*

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and *Mercantile Insurance Co. v. Easson*.³ This was a Scottish case decided in 1919 on the Finance Act, 1915. The appellant company there had agreed to accept a certain class of insurance business at a discount and sought to deduct the discount as a management expense. The Lord President pointed out that this sum was not a disbursement at all—it was a discount and constituted a saving which the assurance company made in respect of a certain class of lives assured. Lord Mackenzie said⁴: “ . . . I think, upon the evidence led before them, the “ special commissioners were entitled to take the view that the “ £42,000 odd was not an expense of management including “ commission, and that the sum in question is not disbursed by “ the company. The £42,000 odd represent 15 per cent. upon “ the premiums paid by policyholders under this special scheme “ of insurance. It was of the nature of a saving—an exceptionally “ favourable rate—granted to these policy holders in consequence “ of their coming in *en bloc*, and so saving to the company “ expenses which otherwise it would have been put to had it dealt “ with these policyholders singly. The character of the payment “ must be gathered from the terms of the contract and I am “ unable to find any support for the view advanced by the “ insurance company either on the construction of article 28, “ article 29 or of article 33 to which our attention was specially “ directed by Mr. Macmillan. The short view sufficient for the “ disposal of the case is that it is impossible to treat as expenses “ of management expenses which have not in fact been paid “ out . . . ”

This case throws no light on the present problem.

Next, I was referred to *Bennet v. Underground Electric Railways Co.*⁵ In that case a company in order to meet the interest on bearer bonds payable in New York was put to a considerable expense in purchasing dollars at an unfavourable rate of exchange. Rowlatt J. said⁶: “ The object of section 33 of “ the Income Tax Act, 1918, is to enable a holding company “ which, unlike a trading company, is not assessed, and has no “ account into which its expenses of management can be “ brought, to obtain relief in respect of those expenses. I have “ therefore to consider whether the loss on exchange suffered “ by this company, which is a holding company, is an ‘ expense “ of management ’ within section 33. The reason why the

³ (1919) 7 T.C. 463, 471.

⁴ Ibid. 472.

⁵ [1923] 2 K.B. 535; 39 T.L.R. 560; 8 T.C. 475.

⁶ [1923] 2 K.B. 535, 537.

" company suffered the loss in question was because, in order to
 " carry on its business, it had to provide itself with money in
 " New York and Amsterdam, and as it did not have money
 " lying there it had to buy it at a high rate. If the company
 " had been able to obtain the needed currency on favourable
 " terms, its management would not have cost less, and on the
 " other hand if, as happened, it could only obtain the necessary
 " money on unfavourable terms, its management cannot be said
 " to have cost more. In either case the cost of management is
 " the same."

This was a clear enough case where the cost of complying with the company's obligations was greater than anticipated, but, as the judge pointed out, this had nothing to do with management.

The next case was *Southern v. Aldwyck Property Trust Ltd.*⁷ The argument here turned on whether the relief was obtainable under Schedule A, in which case it could not be demanded again under section 33. This is irrelevant to my purpose. More pertinent perhaps is *London County Freehold and Leasehold Properties Ltd. v. Sweet*,⁸ where an investment company incurred expense in reorganizing its various classes of loan capital, and this was held not to be an expense of management. Macnaghten J. said⁹: " I think that expenses incurred in the
 " rearrangement of the loan capital of a company stand on the
 " same footing as expenses incurred in raising loan capital.
 " Neither expenses incurred in raising loan capital nor expenses
 " incurred in rearranging loan capital in a manner more satisfac-
 " tory to the company can, in my opinion, be regarded as
 " expenses of the management of the business of the appellant
 " company."

So far the cases merely show that certain outlays are not expenses of management; they do not tell me what such expenses are: nor are they really pertinent to the present case.

I turn now to the case on which the Crown relied and which was no doubt the source of the present demand. I have already alluded to it as *Golder's case*.¹⁰ There the investment company was held not entitled to charge brokerage and stamp duties on changes of its investments as expenses of management within section 33. That was a decision of Croom-Johnson J. upheld in the Court of Appeal, and unless distinction is to be found in

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⁷ [1940] 2 K.B. 266; 56 T.L.R. 808; 23 T.C. 707.

⁹ 24 T.C. 412, 416.

¹⁰ 31 T.C. 265.

⁸ 58 T.L.R. 281; 24 T.C. 412; [1942] 2 All E.R. 212.

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the nature of the businesses it is clearly decisive of the matter in this court. The commissioners there found that changes of investments made by an investment company were incidental to its business, that business being the purchase and retention of investments and the distribution of income therefrom. The company charged the cost of brokerage and stamp duty to capital and the case might have been decided on the ground that these were capital transactions, and indeed Croom-Johnson J. was tempted to do so, but in the end refrained. The commissioners decided that brokerage and stamp duty were an integral part of the purchase price thus increasing the price to be paid. This view was not observed on by Croom-Johnson J., and Tucker L.J. described it in the Court of Appeal as not quite accurate. Croom-Johnson J. made the following observations (after saying that he did not find it necessary to express an opinion on the point about capital)¹¹: “. . . it seems to me that it is impossible for the company here to say, on the facts as proved, not only that as a matter of law these payments are expenses of management but that the commissioners ought to have been satisfied that they were. I do not think they are expenses of management at all. No doubt it was judicious for the company or its directors to do what was done. If they are not expenses of management then the section is not satisfied and the company is not entitled to relief under section 33. I cannot see how, giving the expression ‘management’ its ordinary everyday meaning, it can possibly be said with regard to an investment company that changing its investments, paying stamps on transfers, stamps on contract notes and brokers’ remuneration can be said to be the management of the company. It is no doubt incidental to the business of an investment company but I do not think it is within the expression which is used, giving it, as I think I must give it, its ordinary meaning.”

The judge does not say why he does not think it was an expense of management. In the Court of Appeal there was only one judgment. This consisted almost entirely of quotations from the evidence incorporated in the case and from the judge below. Tucker L.J. says after reading the findings¹²: “Some criticism may be directed towards the reasoning which appears in those findings and in the statement that the sums paid in respect of brokerage and stamp duty constitute an integral part of the purchase price. That may perhaps not be

¹¹ 31 T.C. 270.

¹² Ibid. 272.

“ quite accurate, but they are certainly sums necessarily paid in the course of the transaction of purchase. The gist of the decision lies in the view expressed that the expenses of management in this case are mainly concerned with matters up to the time of the actual purchase or sale of an investment. I think that is the foundation of the commissioners’ finding.” I do not find that in the commissioners’ finding: that is what the judge said. The Lord Justice appears therefore here to express the view that the management ends where executive action begins. He adds these words¹³: “ I would only add that Mr. Grant’s argument, as it seems to me, is really this. He says these expenses were ‘ expenses of management ’ because they were expenses incurred by the management in carrying out the business of the company. That seems to me a totally different thing. What we are concerned with here is the expenses of management, not expenses incurred by the management in carrying out the proper business of the company.” With every respect, this is to use the word “ management ” in two totally different meanings in one sentence. In the second instance “ the management ” means the directors, and if those words are supplied I do not derive any help from the observation which is really only, I think, a repetition of the Lord Justice’s former view that executive action is the conduct of the business and not its management. However that may be, here is a finding that brokerage and stamp duty paid by an investment company are not allowable under the section. There is no actual decision that this applies to an assurance company, and Croom-Johnson J. is careful to limit his judgment to investment companies, but unless a distinction, as was argued before me, can be based on the difference between the businesses of the two companies the decision must cover both. The commissioners pointed out that there is what they style a “ fundamental difference ” between the nature of the businesses of the two companies. I quote from the stated case in the *Sun Life* case: “ There is a fundamental difference in the nature of the businesses carried on by the two companies as well as in the quality of the acts of purchase and sale of investments. In the case of the *Capital and National Trust Ltd.*¹⁴ the purchase and sale of investments were, in the words of Croom-Johnson J. at p. 270, ‘ no doubt incidental to the business of an investment company ’ whereas in the case of the society the purchase and sale of investments are an inherent part of their ordinary

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¹³ 31 T.C. 273.

¹⁴ *Ibid.* 270.

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“day-to-day business activities.” I agree that this is a difference. In one case the investments are the fixed capital of the company and in the other circulating capital. One company buys investments in order to hold them and the other in order to trade with them. Assurance companies are carrying on a trade but investment companies are not—see *Liverpool and London and Globe Insurance Co. v. Bennett*,¹⁵ and compare the *Grange Trust* case¹⁶ already cited. It was submitted to me that if the carrying out of a particular transaction is an integral part of the company’s day-to-day business then the expense so incurred is an expense of management. I should be inclined to agree, but the transaction of buying and selling investments is part of the day-to-day business of both these classes of company, though with different ends in view, and I am unable to see how if not an expense of management in one case it can be such an expense in the other.

I do not conceal the fact that I should not have reached this conclusion unaided, but the authority standing where it does binds me, and is to my mind indistinguishable and I must follow it.

I therefore dismiss the appeals.

K. R. A. H.

The companies appealed.

Sir James Millard Tucker Q.C., L. C. Graham-Dixon Q.C. and *John L. Creese*, for the Sun Life Assurance Society, substantially repeated the arguments submitted before Harman J. with the following additions. Before 1949 the Inland Revenue allowed brokerage and stamp duties as “expenses of management.” It is important to bear in mind that whereas an investment trust company does not carry on a trade within Case I of Schedule D a life assurance company does; the making and changing of investments are ordinary incidents of such a trade, and the income derived from the investments is part of the profits of the life assurance company. Similarly, losses on investments are trading losses.

The phrase “expenses of management,” which is found in the statutory forms in the First Schedule to the Assurance Companies Act, 1929, and in section 5 of the Act of 1870, should be given its ordinary and popular meaning. It covers expenses incurred in the management of the business of the company, or, in other words, the expenses of running the business: *Rosyth*

¹⁵ [1913] A.C. 610; 29 T.L.R. 757;
6 T.C. 327.

¹⁶ [1935] A.C. 422; 51 T.L.R. 320;
19 T.C. 231.

Building and Estates Co. Ltd. v. Rogers,¹ per the Lord Ordinary, and *Southern v. Aldwych Property Trust Ltd.*,² per Lawrence J. It should not be confined to the expenses of the top management only. It would not be practicable to draw the line.

L. C. Graham-Dixon Q.C. following. The word "management" in this context means management with a small "m." The Crown contended below that some restriction should be placed on the word "management," but nothing in section 33 of the 1918 Act requires such an interpretation. The investments which are the subject of the present appeals are in the nature of circulating capital rather than investments, and have the character of trading stock, and therefore costs incurred in their purchase, sale and change should be allowed as expenses of management. [The following cases, in addition to those cited in the judgments, were also referred to: *Revell v. Edinburgh Life Insurance Co.*³; *Bennet v. Underground Electric Railways Co.*⁴; *Last v. London Assurance Corporation*,⁵ and *Love v. Norman Wright (Builders) Ltd.*⁶]

Sir Harry Hylton-Foster Q.C., S.-G., Roy Borneman Q.C. and *Sir Reginald Hills*, for the Crown on both appeals, repeated the arguments addressed to Harman J. and submitted that the facts of the present appeals were indistinguishable in any material particular from those in *Capital and National Trust Ltd. v. Golder*,⁷ decided by the Court of Appeal, and that that decision was therefore binding.

F. Heyworth Talbot Q.C. and *F. M. Young* for Phoenix Assurance Co. Ltd., appellants in the second appeal, adopted the argument of Sir James Millard Tucker in the first appeal and added that *Golder's* case⁷ was that of an investment trust of a limited nature, and that in an investment company it was not essential for the investments to be changed. In an assurance company the purchase, sale and change of investments is a dynamic activity directed to a trading end; in an investment company such activity is static and concerned with investment as such. That is a difference in purpose and quality.

Sir Harry Hylton-Foster Q.C., S.-G. replied.

Cur. adv. vult.

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¹ (1921) 8 T.C. 11, 16.

² [1940] 2 K.B. 266; 56 T.L.R. 808; 23 T.C. 707, 711.

³ (1906) 5 T.C. 221.

⁴ [1923] 2 K.B. 535; 39 T.L.R. 560; 8 T.C. 475.

⁵ (1885) 10 App.Cas. 438; 1 T.L.R. 617; 2 T.C. 100.

⁶ [1944] K.B. 484; 60 T.L.R. 349; [1944] 1 All E.R. 618.

⁷ (1949) 31 T.C. 265; 65 T.L.R. 722; [1949] 2 All E.R. 132, 956.

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SINGLETON L.J. These two appeals raise the same points and were heard together at the request of counsel, or, perhaps I should say, that after we had heard argument on one, counsel in the other adopted the argument on that appeal and added some submissions on his case which, though short, were most useful. Both appeals are from judgments of Harman J.¹ dismissing appeals from decisions of the Special Commissioners. I propose to deal generally with the appeal of the Sun Life Assurance Society.

The appeal arises from, or under, section 33 of the Income Tax Act, 1918, which provides: [His Lordship read section 33 and continued:] The question for decision is whether certain payments made by the company fall within the words “any sums disbursed as expenses of management (including commissions).” This section took the place of a like provision in the Finance Act, 1915.

The reason for, and the object of, the section is clearly stated in the judgment of Romer L.J. in *Simpson v. Grange Trust Ltd.*²: “The object, or the general object, of the section cannot be in doubt. There are many companies the principal part of whose income is derived from investments, and in respect of those investments the companies have been taxed by deduction at the source or by direct assessment, but they never had an opportunity of bringing in against their profits—that is to say, deducting from their profits for the purposes of taxation—their management expenses, either because they were not trading companies at all, or because, being trading companies, the Crown had elected to tax them on the income of their investments rather than under Schedule D. It was that injustice—anything can be called an ‘injustice’ under the Income Tax Acts—that the section was intended to remove”; and in the speech of Lord Wright³: “The section reproduced section 14 (1) of the Finance Act, 1915, which first gave relief in such cases. An ordinary trading company assessed on the balance of its profits and gains for the year under Schedule D, Case I, is entitled, in order to arrive at the balance, to an allowance for outlays incurred for the purpose of earning its profits: the companies or concerns enumerated in section 33 (1), whose

¹ Ante 528; [1955] 3 All E.R. 552.

² [1935] A.C. 442; 51 T.L.R. 320; 19 T.C. 231, 246.

³ 19 T.C. 250.

“income is in the main taxed by deduction, would be placed at
 “a disadvantage if no allowance was made to them for manage-
 “ment expenses.”

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The Crown elected to tax both the appellant companies—and, I believe, all other British insurance companies—on the income from their investments rather than under Schedule D. Consequently, the companies so taxed have, since the year 1915, been entitled to the relief which is now given by section 33 of the Income Tax Act, 1918. Whether sums disbursed are disbursed as expenses of management seems, at first sight, to be a question of fact, but it is not quite so simple as that, as the findings of the Special Commissioners show.

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I will read paragraphs 6, 7, 8 and 9 of the case: “6. The
 “annual premiums payable on the policies issued by the Society
 “are fixed at the date of issue of the policies and are unalterable
 “throughout the life of the policies. The premiums are calcu-
 “lated on the basis that the Society will invest them at interest
 “and continue to invest its income from investments. In fixing
 “the premiums payable on its policies the Society assumes a
 “net rate of interest or dividend after deduction of income tax
 “and takes into account other factors such as mortality rates
 “and the proportion of the expenses of management of its
 “business which will have to be borne out of the premiums,
 “less the income tax recoverable under section 33 in respect of
 “these expenses. The business of life assurance is highly
 “competitive. It is therefore essential that, in order to keep
 “its premiums as low as possible, the Society should invest its
 “premiums to the best advantage and, as necessary, change the
 “investments from time to time. Moreover, it is necessary that
 “the premiums should be invested to earn a rate of interest
 “sufficient to meet the Society’s obligations under its policies
 “as well as to provide profits for the benefit of participating
 “policyholders and of shareholders. A constant watch must also
 “be kept on the Society’s investments to avoid excessive
 “depreciation which might jeopardise the security of the life
 “assurance fund. Thus in the ordinary course of carrying on its
 “business it is necessary for the Society to purchase investments
 “and from time to time to sell or change such investments. The
 “investments made by the Society are part of its circulating
 “capital and do not constitute part of its fixed capital assets.

“7. In order to carry out the day-to-day work in respect of
 “the investment and reinvestment of its moneys in the life
 “assurance fund the Society has a special staff of employees in

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“ the investment department. This department is concerned
 “ with buying investments quoted on the Stock Exchange and
 “ also with investing the Society’s money privately, that is not
 “ through the agency of members of the Stock Exchange. In
 “ addition, the Society makes investments by advancing moneys
 “ at interest to policyholders on the security of their policies.

“ 8. The amount of the salaries paid for the year ended
 “ December 31, 1949, to all employees of the Society including
 “ the staff of the investment department and those dealing with
 “ advances to policyholders was included as part of the expenses
 “ of management in the Society’s claim under section 33 for the
 “ year of assessment 1949–50. No objection to any part of the
 “ amount so included was made by the respondent. In addition
 “ to salaries of staff which amounted to £513,678, no objection
 “ was raised by the respondent to the inclusion among manage-
 “ ment expenses of the following amounts disbursed by the
 “ Society in the year ended December 31, 1949, which manage-
 “ ment expenses were the subject of the claim under section 33
 “ for the year of assessment 1949–50.” These items, as we see
 in the figures, included “ Travelling allowances: staff catering:
 “ rents, rates and taxes: Inland Revenue stamps on policies:
 “ law charges for investigation of title to property mortgaged to
 “ the Society under a scheme for the purchase of houses by
 “ policyholders: printing and stationery.”

“ 9. The respondent did, however, object to the inclusion in
 “ the claim under section 33 of the sum of £40,773 being the
 “ amount included therein in respect of commission to stock-
 “ brokers and stamp duties disbursed by the Society in connexion
 “ with the purchases and sales of investments, such as are
 “ referred to in paragraph 6 above. However, the Society had
 “ each year since the passing of the 1915 Finance Act, up to and
 “ including the year of assessment 1948–49, claimed and been
 “ allowed relief under section 33 in respect of expenses which
 “ included similar amounts disbursed by way of brokerage and
 “ stamp duties, the respondent not having objected to their
 “ inclusion as part of the expenses of management for such
 “ years.”

The objection to the items included in the figure of £40,773
 was based on a decision of this court in *Capital and National
 Trust Ltd. v. Golder*,⁴ to which I shall refer as *Golder’s* case.

On behalf of the society it was claimed that sums paid for
 brokerage charges (or commissions) and stamp duties were

⁴ (1949) 65 T.L.R. 772; [1949] 2 All E.R. 132, 956; 31 T.C. 265.

disbursements necessarily made by them in the ordinary day-to-day trading activities of the society and that they were "sums" "disbursed as expenses of management (including commissions)" within the meaning of those words in section 33.

On behalf of the Crown it was contended that the case was governed by the decision in *Golder's case*,⁴ in which it was held that disbursements of a similar kind made by an investment trust company were not on the facts there found sums disbursed as expenses of management. The Special Commissioners held that the claim of the society in regard to items comprised in the figure of £40,773 failed. Harman J. dismissed the appeal of the society from that decision, adding: "I do not conceal the fact" "that I should not have reached this conclusion unaided, but" "the authority [*Golder's case*]⁴ standing where it does binds" "me, and is to my mind indistinguishable and I must loyally" "follow it."

On the appeal of the society to this court, Sir James Millard Tucker submitted that this case can be distinguished from *Golder's case*⁴ and, while recognizing that the judgment in that case is binding upon us, argued that in the case of an insurance company carrying on a trade or business which embraced day-to-day purchases and sales of stocks the disbursements to which objection was taken should be held to fall within the relief given by the section.

In *Liverpool and London and Globe Insurance Co. v. Bennett*⁵ Hamilton J. used words which seem to me to be helpful in considering the activities of insurance companies generally. He said: "There is another point with regard to the insurance" "company. It embarks its funds in its business simply by" "having money ready to pay its debts with. We are not here" "concerned with manufactories or the maintenance of a stock" "which is to be sold. The business of insurance consists in" "making promises to pay, by way of indemnity, *in futuro* and" "contingent sums in consideration of present payments of" "money, and the whole business therefore, apart from the" "wisdom and prudence with which it is conducted, consists in" "being ready to meet the liabilities if they accrue, and to the" "extent to which they accrue, out of one class of funds or" "another. Consequently the money is embarked in the business" "as soon as it is money which belongs to and is available to" "the insurance company. If they have paid it away in the shape

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⁴ 65 T.L.R. 772.

⁵ [1911] 2 K.B. 577, 589; 6 T.C. 327, 357, 358.

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“ of dividends, it is no longer available, but all their assets
 “ substantially are only possessed for the purpose of meeting the
 “ contingencies of losses on the policies if they should fall in.
 “ I am speaking of fire insurance only as an illustration, but I
 “ do not think that either indemnity business or, for this purpose,
 “ life business differs, although of course the calculation of risks
 “ and the mode of carrying out the transaction are enormously
 “ different.

“ Now, the practice of English insurance companies, which is
 “ found to be the practice of the companies in question here, has,
 “ as far as I know, always been to start from the very first
 “ accumulating large accessible funds for the purpose of meeting
 “ losses. The advantages are numerous. It renders the calling
 “ up of unpaid capital an extremely improbable event; it presents
 “ to the insuring world an enormous reserve of security; it assures
 “ within the company a uniform dividend and a uniform state
 “ of solvency apart from the changes and chances of a business
 “ which is essentially a business of hazards, and consequently
 “ it is the very pivot of the conduct of a fire insurance business
 “ to build up with prudence, by not distributing surpluses of
 “ premiums as and when they are received, large reserve funds
 “ and to invest them, of course, so that they may not be fruitless
 “ while they are held in hand. That is the policy that is pursued
 “ here under Class C, and thanks to it and thanks to the usual
 “ policy of not putting all the eggs in one basket, either with
 “ regard to the risks or the investments, the companies have
 “ under all imaginable contingencies large available funds in
 “ different parts of the world readily realizable in case of need.
 “ As it appears from the case of the Liverpool and London and
 “ Globe that emergency practically does not arise. But the
 “ funds received from the investments are just as much part of
 “ the receipts of the business, and the making of the investments
 “ is just as much part of the mode of conducting the business,
 “ as the taking of the risks, and except to the extent to which
 “ the current account at the bank, fed by premiums on the one
 “ side and depleted by losses paid on the other, is sufficient to
 “ carry on the business, all these funds in their several degrees
 “ may have to be called upon at some time or in some way or
 “ other.”

It is found in the case that it is necessary for the society
 in the ordinary course of carrying on its business to purchase
 investments and from time to time to sell or change such invest-
 ments and that that is part of the day-to-day work of the society.

What, then, is the meaning of the expression "any sums disbursed as expenses of management"? If it be contended that the words are limited to the head management, I would draw attention to *Rosyth Building and Estates Co. Ltd. v. Rogers*,⁶ in which case the Lord Ordinary (when dealing with a claim under section 14 of the Finance Act, 1915), treated the expression as meaning "the expenses of managing its business" incurred in the year in which it has been so charged; and Lawrence J. in *Southern v. Aldwych Property Trust Ltd.*,⁷ said that the question was whether the costs of advertising were expenses of the management of the company's business.

The expression "expenses of management" is, I think, taken from the statutory forms in the First Schedule to the Assurance Companies Act, 1909, which are required under section 4 of the Act and which have to be deposited with the Board of Trade (section 7). I draw attention to Form A in the Revenue Account, First Schedule, in which the expression "expenses of management" appears. There was a similar provision in section 5 of the Life Assurance Companies Act of 1870, and the statutory forms for revenue accounts in the different schedules contain the same words "expenses of management." The making of investments is, to use the words of Hamilton J.,⁸ "part of the mode of conducting the business" of the society. Apart from the decision in *Golder's case*,⁹ I should have thought that the words "expenses of management" mean expenses properly incurred in the course of managing or conducting the business or, to put it in another way, the expenses of running the business.

The Special Commissioners in their findings in paragraph 15 recognize the fact that, in the ordinary course of carrying on its business, it is necessary for the society to purchase investments out of its premium income and from time to time to change such investments. They say in paragraph 15 (5) that there is a fundamental difference between the business carried on by the society and the business of an investment company such as was considered in *Golder's case*,⁹ but they hold in paragraph 15 (6) that brokerage and stamp duties "being not general expenses of conducting the Society's business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of the management." On this ground they held that the claim of the society

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⁶ (1921) 8 T.C. 11, 16.⁸ [1913] A.C. 610.⁷ [1940] 2 K.B. 266; 56 T.L.R.⁹ 31 T.C. 265.

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failed. It is necessary to ask oneself why, if it is part of the day-to-day business of the society to purchase investments, the costs of carrying through the transaction is not part of the expenses of managing or conducting the business.

Now, whenever the society purchases stocks or shares it is of necessity bound to pay stamp duty and brokerage. The former is an obligation by statute, and the latter is a well recognized charge under the rules of the Stock Exchange, a charge which includes not only payment for the carrying through of the transaction but also remuneration to the broker for his advice, for which he is not paid unless a transaction of buying or selling follows. If the purchase is part of the ordinary day-to-day business of the society it is difficult at first sight to see why something which the society has to pay in order to carry out the purchase is not an expense of the ordinary running of the society's business. It is argued that the expenses of management end when a decision is made to buy, and thus that the cost of stamp or brokerage which takes place later is not an expense of management. That cannot be right, for someone on behalf of the society has to receive and to check the securities, and the broker is under the duty of seeing to the transfers and forwarding the securities. That is a part of his work in return for the remuneration he receives by way of brokerage or commission. It seems to me to be impossible to split up the transaction in this way: to do so is to depart from common sense.

If there had not been any authority on this question, I am inclined to the view that I should have said that the expenses here in question were expenses of management, but I find myself faced with two difficulties. The first is that which faced Harman J.—the decision of this court in *Golder's* case¹⁰ (to which I was a party)—and the second is that the Solicitor-General, on behalf of the Crown, did not submit any argument on whether that case was rightly decided or not, but rested his submission on the decision, which he submitted was conclusive of the appeal so far as this court is concerned. In those circumstances, it would not be right of this court, in the absence of argument on one side, to express any opinion upon the decision. We are bound by it if it covers this appeal. Harman J. was unable to distinguish this case from *Golder's* case.¹⁰ It was said, on behalf of the society, that the decision in *Golder's* case¹⁰ was not conclusive on this appeal. Support for this can be found from paragraph 15 (5) of the stated case. It was pointed out that

¹⁰ 31 T.C. 265.

the society is a trading concern and carries on different branches of business, and that its investment business is related to its circulating capital, whereas in *Golder's* case¹⁰ the purchases and change of stocks were in relation to that which I may describe as the capital of the company. In a case such as *Golder's* case¹⁰ the cost of changing from one form of security to another—be it from real property to stocks and shares, or from one stock to another—might well be a charge against capital, and not an expense of management even though the management of the company had devoted time to the consideration of it. This, however, was not the basis of the judgment in *Golder's* case,¹⁰ as appears from the judgment of Tucker L.J. (as he then was) when he said¹¹: “I would only add that Mr. Grant’s argument “as it seems to me is really this. He says these expenses were “‘expenses of management’ because they were expenses “incurred by the management in carrying out the business of “the company. That seems to me a totally different thing. “What we are concerned with here is the expenses of manage- “ment, not expenses incurred *by* the management in carrying “out the proper business of the company.”

I think it right to say that the admirable argument we had on the activities of insurance companies cast new light on the position so far as I am concerned. It would have been of great advantage if this case had been heard before *Golder's* case¹² came before the court. The Crown now seeks to extend the decision in that case to insurance companies. At the moment only some of the expenses claimed by the society are attacked by the Crown, after many years acceptance of them as legitimate, but from answers given during the argument, it appears that other objections may follow and that much of that which has been regarded as within the relief given to insurance companies may disappear if the contention of the Crown is upheld.

I feel that it is the duty of this court to say that upon the authority of the decision of this court in *Capital and National Trust Ltd. v. Golder*¹² the appeal should be dismissed.

In the appeal of the Phoenix Assurance Co. Ltd., Mr. Young submitted that the character of the purchases of stocks and shares was different from that in *Golder's* case.¹² In the latter the purchaser was buying to hold whereas an insurance company bought for the purposes of its trade or business. He summed up the case in this way: “If you cannot carry on a part of your

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¹⁰ 31 T.C. 265.¹² 31 T.C. 265.¹¹ *Ibid.* 273.

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1956 "expense of your trade or business."

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There is no material difference between the two appeals before the court, and the appeal of the Phoenix Assurance Co. Ltd. should be dismissed.

MORRIS L.J. (read by Singleton L.J.). Each of the appellants is, in the wording of section 33 (1) of the Income Tax Act, 1918, "an assurance company carrying on life assurance business." In the case of each "it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I of Schedule D." It follows, therefore, that in reference to its life assurance business, in respect of which there is the separation enjoined by section 3 of the Assurance Companies Act, 1909, each is "entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions)." Each company made claims for repayment and the only items in issue are sums paid in respect of brokerage and stamp duties in connexion with the purchases and sales of investments.

It is not in contest that amounts paid by the appellants in respect of brokerage and stamp duties are "sums disbursed." Nor do I understand that it is disputed that they are "sums disbursed as expenses." The sole dispute is whether they are sums disbursed as expenses "of management."

The appellants, citing the decision in the Court of Session in *North British and Mercantile Insurance Co. v. Easson*,¹³ submit that the words of section 33 are expressed in ordinary and popular language upon which no special and technical meaning can be placed. The appellants point to certain judicial phrases which have been employed and which it is submitted are helpful indications as to the ordinary meaning of the words. Thus, in *Rosyth Building and Estates Co. Ltd. v. Rogers*,¹⁴ the Lord President spoke of "the expenses of managing its business." So in *Southern v. Aldwych Property Trust Ltd.*,¹⁵ Lawrence J. spoke of "expenses of the management of the respondent company's business." The case of *London County Freehold and Leasehold Properties Ltd. v. Sweet*¹⁶ proceeded on an acceptance of such an interpretation of the words. Macnaghten J. said¹⁷:

¹³ (1919) 7 T.C. 463, 473.

¹⁴ 8 T.C. 11, 16.

¹⁵ [1940] 2 K.B. 266; 56 T.L.R. 808; 23 T.C. 707, 711.

¹⁶ (1942) 58 T.L.R. 281; [1942] 2 All E.R. 212; 24 T.C. 412.

¹⁷ 24 T.C. 412, 415.

"It was said by Mr. King on behalf of the appellant that the words 'expenses of management' in section 33 must mean the expenses of the management of the business of the company, and that view of the meaning of those words is not disputed by the Crown."

The findings in the present case show (a) that it is essential for the appellants to purchase investments, to keep a constant watch on these investments and, as and when necessary, to sell or to change their investments; (b) that purchases and sales of investments form an inherent part of the ordinary day to day business activities of the appellants; (c) that amounts expended on brokerage and stamp duties are necessarily paid in the course of the transactions of purchase and sale.

The appellants submit that as the "sums disbursed as expenses" (for instance, the brokerage and stamp duties) are necessarily disbursed in the course of transactions which are necessary and which are inherent in the ordinary day to day business activities, they are sums disbursed as expenses "of management."

The Crown submit that in this court the matter is concluded by the decision in *Capital and National Trust Ltd. v. Golder*.¹⁸ The Solicitor-General submitted that that case is not distinguishable. He submitted that no occasion arose for him to rebut such contentions of the appellants as involved criticism of it.

When considering these appeals it seems to me that attention must be focused upon an analysis of the transactions which are in question so that it can be decided whether sums disbursed as expenses are or are not expenses "of management." The way in which entries are made in books cannot therefore be decisive. Nor is a decision advanced by considering what attitude the Crown have at any time adopted in regard to the items under immediate review or in regard to other items. Thus items of the kind now being considered were for many years accepted by the Revenue as qualifying for entitlement for repayment of tax. So, also, other items which possess features of similarity (such as law charges for investigation of title to property mortgaged under a house purchase scheme or Inland Revenue stamps on policies) have been accepted. These facts and circumstances do not advance the solution of the problem. Nor does it assist to have in mind that a private individual who buys shares may so closely associate what he pays for brokerage and stamps with what he

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pays for the shares that he may loosely refer to his total outlay as being what the shares have cost him.

When the appellants purchase shares they have to pay the price of the shares, and they have to expend sums in the course of the transaction of purchase. It is not suggested that the price paid for the shares could be regarded as being money disbursed "as expenses of management." In *Golder's case*¹⁹ one point adverted to was whether sums which must necessarily be disbursed in the process of buying shares should be regarded as partaking of a capital nature and of being, for that reason, outside the ambit of the words "expenses of management." This point was, however, not decided but was left open by Croom-Johnson J. and by the Court of Appeal.

When it is said that sums paid in respect of brokerage and stamp duty are part of the cost of acquiring an investment or are part of the cost of the investment, a new word, the word "cost," is introduced which in turn calls for analysis. The "cost" will include price. The price paid for shares will be within the words "sum disbursed," but not within the words "as expenses of management." In regard to the sums disbursed for brokerage and stamp duty the question seems to be whether these sums are expenses which are merely the result of or consequent upon decisions made or actions taken in the managing of insurance business so that these expenses are not part of the expenses "of management" or, inasmuch as they are necessary expenses in the carrying out of a necessary function in the managing of insurance business, whether they are expenses "of management."

In approaching this question, it seems to me that the Solicitor-General is correct in submitting that it is essential to decide whether *Golder's case*,²⁰ which is binding upon us, is distinguishable.

It must be recognized that the functions of management may vary as between different concerns. It is to be noted also that in *Golder's case*²⁰ there was no actual claim made for sums representing brokerage and stamp duties relating to investments by way of capital expansions, though there was no admission that such a claim could not lawfully be made. The claim was advanced in regard to sums representing brokerage and stamp duties in connexion with changes of investments. It was held that such sums were not "expenses of management."

¹⁹ 31 T.C. 265.

²⁰ *Ibid.*

It is said that assurance companies carry on a trade, whereas investment companies do not. It is said that the investments of assurance companies constitute circulating capital, whereas the investments of investment companies are their fixed capital. While these are differences they do not, in my judgment, form any basis for distinguishing the decision in *Golder's* case²⁰ as being inapplicable to the present case. It is said that in the case of assurance companies investments are an inevitable inherent necessity of their trade and that the changing of investments is essential, whereas such changing is not essential in the case of investment companies. Stated otherwise, it was said that from the point of view of an investment company investments are rather of static nature whereas investing and the changing of investments is for an assurance company a dynamic activity. I doubt the significance of these contrasts: both investment companies and insurance companies must constantly be concerned in buying and selling investments: the extent and degree of their activities may vary. I can see no reason why the decision in *Golder's* case²⁰ does not govern the present cases.

The question as to how in the absence of authority the issue which is raised might have been decided does not, therefore, arise, and as we have not heard full argument on such question I express no opinion. I would dismiss the appeals.

ROMER L.J. Notwithstanding the attractive provocation of Sir James Millard Tucker's submissions in opening his appeal, the Solicitor-General declined to allow himself to be drawn into a discussion of the merits of *Golder's* case.²⁰ The logic of his attitude in this respect is unassailable. If the decision in *Golder's* case²⁰ is applicable to the cases now before us then we must apply it, whether the decision was right or wrong, whilst if it is inapplicable the soundness or otherwise of the decision becomes irrelevant; on either view, therefore, says the Solicitor-General, this is neither the time nor the place to put *Golder's* case²⁰ upon its trial. Realizing, as I do, the force of this, and having heard arguments on one side but not on the other, I express no opinion as to the validity of Sir James Tucker's impeachment of the decision.

The ratio decidendi of *Golder's* case,²¹ as it seems to me, was that the phrase "expenses of management," as used in section 33 of the Income Tax Act, 1918, means, in effect, the expenses of the managers of a company (who would normally

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²⁰ 31 T.C. 265²¹ Ibid.

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be the board of directors) and not the expenses incurred by the company in the general management of its business; in other words, the phrase is directed to the expenses involved in shaping policy and in other matters of managerial decision and does not extend to expenses subsequently and consequently incurred at lower levels of the company's executive structure. If this be so, I am unable to see any relevant distinction between the disbursements which were disallowed in *Golder's* case²¹ and those which are in issue upon the present appeals. It is just as much a part of the day-to-day business of an investment trust as it is of that of an assurance company to purchase and change the investments which represent its capital; and it appears to me that the question whether that capital is fixed or circulating is as immaterial to the present issue as is the difference in purpose which each type of company may have in mind when investing or reinvesting in stocks and shares. I therefore think that the principle of *Golder's* case²¹ governs the cases which are now before us and that the appeals must accordingly be dismissed. I would only add one further observation. The "expenses of management" which the Crown are challenging in these cases are only of a limited character. If, however, the challenge is well founded, as we must hold it to be, so many other expenses, hitherto undisputed but indistinguishable in quality, would appear to fall within its scope as to defeat in great measure the object of section 33 as expounded by the late Lord Romer in *Simpson v. Grange Trust Ltd.*²² This in itself, and apart from sundry other considerations, casts grave doubt, as it seems to me, upon the validity of the construction of the section for which the Crown contend and lends corresponding force to the submissions of the appellants.

Appeals dismissed.

Leave to appeal to House of Lords.

Solicitors: *Hair & Co.; Slaughter & May; Solicitor of Inland Revenue.*

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

²¹ 31 T.C. 265.

²² 19 T.C. 231, 246.

In re BARR'S CONTRACT.
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June 15.

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[1956 A. 665.]

Vendor and Purchaser—Completion—Date of—Failure to complete on date fixed—Notice making time essence of contract and requiring completion within 28 days—Reasonableness—Validity—National Conditions of Sale, 16th ed., cond. 23 (1).

By condition 23 (1) of the National Conditions of Sale (16th ed.) it is provided as follows: "At any time on or after the completion date, the vendor, being himself able, ready and willing to complete, may (without prejudice to any other right or remedy of "the vendor against the purchaser) give to the purchaser or his "solicitor notice in writing requiring the purchaser to complete "within such period (not being less than 28 days) as the notice "shall prescribe. And if the purchaser shall not complete accordingly, the vendor may at any time after the expiration of the "notice, without previously tendering a conveyance, forfeit the "deposit and resell the property by public auction subject to such "conditions as he shall think fit."

By a contract dated January 19, 1956, which incorporated the above condition, vendors agreed to sell to purchasers certain property for £50,000, receiving a deposit, completion being fixed for January 31. At the time, as the vendors well knew, the purchasers were relying on carrying out a sub-sale to provide the money necessary to complete, in the negotiations for which the vendors were acting as the purchasers' agents. On February 1, completion not having been effected, the vendors served on the purchasers a notice under condition 23 (1) requiring the purchasers to complete within 28 days. On the purchasers failing to comply with the notice, but later seeking to complete:—

Held, that on its true construction the condition required the notice to allow such a time as in all the circumstances was reasonable, which might not be less than 28 days but might well be more; and that, in the circumstances, 28 days was not reasonable, so that the notice was of no effect and the vendors had not effectively rescinded the contract.

ADJOURNED SUMMONS.

By a contract dated January 19, 1956, the vendors, George Rudolph Barr and Herbert Rawnsley Barr, agreed with Moorwell Buildings Ltd. (hereinafter called "the purchasers") for the sale to them of a freehold property in King Street, Covent Garden, London, together with a piece of land used as nursery gardens at Burnham in Buckinghamshire. The sale was for a total sum of £80,000, of which £50,000 related to the property in London

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and £30,000 to the property at Burnham. A deposit of £3,500 was paid, and the provisions as to completion in clause 7 of the contract were as follows: "The date for completion of the " purchase of the property first hereinbefore described [i.e., the " London property] shall be January 31, 1956, when upon pay- " ment by the purchaser to the vendors of a sum of £50,000 (no " credit being given for the deposit paid on the signing hereof) " the vendors will assure such property to the purchaser. The " date for completion of the property secondly hereinbefore " described shall be May 31, 1956, when upon payment by the " purchaser to the vendors of the sum of £30,000 (credit being " given for the said deposit) the vendors will assure such " property to the purchaser." Clause 9 contained a reference to an appeal against the refusal of the local planning authority to grant planning permission for the erection of residential dwelling-houses on the land at Burnham and provided that the purchaser should take over and prosecute the appeal with the assistance of the vendors.

Clause 10 provided: "In the event of the planning permission " being granted within five years from the date hereof enabling " the purchaser or its successors in title to develop the land " secondly hereinbefore described for residential or industrial " purposes or in the event of the said land within the said period " being zoned under the Town and Country Planning Acts for " residential or industrial purposes the purchaser or its successors " in title as the case may be will pay to the first named vendor " hereto personally or to his personal representatives as the case " may be the sum of £5,000 and the purchaser shall in the con- " veyance of such land to him enter into a covenant to this effect " such covenant to be framed so as to bind not only the purchaser " but its successors in title." Clause 12 provided for the con- tinuance by the vendors as the agents for the purchasers of a contemplated sub-sale to a sub-purchaser, at the price of £45,000; and the National Conditions of Sale, 16th ed., were deemed to be incorporated in the contract.

On February 1, 1956 (the day after the date for completion in regard to the London property) the vendors, by their solicitors, served a notice on the purchasers requiring them to complete the contract with regard to the London property, that is, as regards the price of £50,000, within 28 days from the date of the notice. This notice was served on the purchasers by the vendors in reliance on condition 23 (1) of the National Conditions of Sale as set out above.

Circumstances had arisen, which are fully stated in the judgment, showing that the purchasers were desirous of completing the contract, but that there were difficulties in the way of their producing the sum of £50,000 within 28 days of the date of the notice.

A summons was, therefore, taken out by them, asking for a declaration that the vendors had not rescinded and were not entitled to rescind the contract, and that the notice of February 1, 1956, was of no effect.

Samuel Stamler for the purchasers. In equity three conditions must be fulfilled before a vendor may make time of the essence in a contract for the sale of land: (1) he must himself be able and willing to complete; (2) the purchaser must be in default to justify the vendor in rescinding; (3) the time stipulated for completion in a contract must be reasonable in all the circumstances. [Reference was made to *Green v. Sevin*¹ and *Smith v. Hamilton*.²] The 16th edition of the National Conditions of Sale, clause 23 (1), attempts to do away with requirement (2) (*supra*) and is inequitable. In any event, clause 23 (1) does not do away with requirement (3), and in the circumstances of the present case the time stipulated in the completion notice was unreasonable. This is the first time that this point has arisen on clause 23 (1) of the 16th edition.

Peter Foster for the vendors. It is agreed that the point has arisen for the first time, and the parties are also in agreement as to the three requirements in equity. It is submitted, however, that requirement (2) (*supra*) did not apply in view of the provisions of clause 23 (1), and, further, that the time in the notice was reasonable, because there were no particular conveyancing difficulties and financial circumstances should not be taken into account.

DANCKWERTS J. stated the facts above set out and continued: This is an application by the purchasers for a declaration, in effect, that the vendors are not entitled to rescind the contract, as they claim, and forfeit the deposit; and the vendors are relying on condition 23 (1) in the 16th edition of the National Conditions of Sale as giving them the right, which they claim to have exercised, to determine the contract and forfeit the deposit of £3,500. The facts as regards that particular clause, which I

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¹ (1879) 13 Ch.D. 589.

² [1951] Ch. 174; 66 T.L.R. (Pt. 2) 937; [1950] 2 All E.R. 928.

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shall have to go into in detail later, are that on February 1, 1956—that is the day after the date fixed for completion in regard to the London property—the vendors by their solicitors served a notice on the purchasers requiring them to complete the contract with regard to the London property, that is, as regards the price of £50,000, within 28 days from the date of the notice given to complete.

The facts in more detail are as follows. The negotiations for the purpose of the contract began about September of 1955. At that time planning permission which was required for the erection of dwelling-houses on the land at Burnham had been refused, but there was an appeal pending against that decision. Subsequently the purchasers sent a cheque for £200 to the vendors for the purpose of paying counsel's fees in regard to the conduct of that appeal. That cheque was, unfortunately, dishonoured when it was presented, but this appears to have been, so far as I can see from the account of the purchasers, an accident, because when the cheque was re-presented it was duly paid and apparently there was no difficulty in obtaining payment for the cheque which was given for the deposit of £3,500.

Negotiations continued, but, although the price had been agreed at a comparatively early date (I think in November), the contract was not signed until January 19, 1956. I think it is right to say that this was not due entirely to any delay on the part of the purchasers, because the vendors undoubtedly introduced some new provisions in regard to the contract at a comparatively late date and consequently they cannot be entirely acquitted of some responsibility for the delay in the eventual signing of the contract; but when the contract was signed on January 19, 1956, there was obviously a very short time before the date for completion in regard to the London property would occur. At that time the negotiations for the sub-sale of the London property appeared to be going perfectly well, and it was not until the last moment, when the sub-purchasers found that they had difficulty in financing their £45,000 purchase, that the sub-contract failed to result in the signing of an actual contract. Of course, if the sub-sale had gone through, the purchasers would have been able to obtain a large part of the price, which they had to find on completion, through the payment by the sub-purchasers which would be made to them under the sub-contract. That came to an end just before the date fixed for completion, it seems to me, and thereupon the purchasers were faced with

the formidable task (which, as everybody knows, is more formidable in present conditions of restricted credit) of finding a sum of no less than £50,000—because they could get no credit for their deposit—on January 31, 1956. Thereupon they found themselves faced with what I can only describe as this sudden demand for completion within 28 days with, as I have pointed out, the task of finding a sum of £50,000.

The clause which is relied on by the vendors is a clause which differs from the corresponding clause (25 (1)) in the 15th edition of the National Conditions of Sale, and is in these terms: [His Lordship read condition 23 (1) in the 16th edition of the National Conditions of Sale and continued:] It is admitted, and it is plain, that under the terms of the contract of January 19, 1956, time was not of the essence as regards the completion of the contract. But it is contended that this clause allows the vendors unilaterally, by a notice under this clause, to make time of completion of the essence; and it is contended that the clause operates, according to one construction that might be put on it, although the purchaser is not in the least in default, because the notice may be given on the very day when completion is due, when it is still open to the purchaser to complete in accordance with the terms of the contract and he is therefore not in default in any way at all. In this case the notice in question was not given actually on the date fixed for completion; it was given on February 1, when, I suppose, the purchasers might be said to be possibly one day in default. It requires completion to be within 28 days “from the date hereof,” “the date hereof” being the date at the end of the notice, that is, February 1, 1956.

A point was taken on behalf of the purchasers in regard to that. It was argued that this notice did not give a minimum time of 28 days required by the paragraph in the National Conditions of Sale because it was not in fact received, as appears from the receipt endorsed on it, until February 2, 1956, and therefore, it is said, that 28 days from the 1st would not be more than 27 days and therefore less than the minimum. It is, however, notice to complete within 28 days “from the date “hereof,” and there is authority in regard to tenancies and the like for saying that “from” excludes the actual day of the date of the notice, so that the time starts from the following day, and, on that construction, it may be there is a full time of 28 days allowed by the notice for completion by the purchasers. But I am bound to say that when I first saw the proposition which was made on behalf of the vendors I was amazed to find that there

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was a condition of sale in a common form of conditions of sale of this type apparently, if the construction contended for on the part of the vendors is right, enabling the vendors to forfeit the deposit and determine the contract immediately on the date for completion falling due or being exceeded. It is a very startling proposition and one which obviously most purchasers would be well advised not to accept, and one which might be very difficult to comply with in conditions, at any rate, in regard to a substantial sale.

The question which really has to be considered is whether this condition is to be effective according to the stark nature of its terms, or whether it must be construed in such a way as to give it a reasonable effect according to the circumstances of the case. Apart from the provisions of any plain and clear conditions of sale, the law about making time of the essence of the contract for the purpose of completion, as I think is accepted on both sides, is subject to the following conditions: first of all, the vendor must be able, ready and willing to proceed to completion; and it is not contested that the vendors were able and ready to proceed with the completion of the sale of the London land in the present case, because they were registered with the possessory titles from a date in 1921, and consequently there was very little difficulty in ascertaining their title. Secondly, at the time when the vendor purports to make time of the essence, the purchaser must be guilty of such default as to entitle the vendor to rescind the contract subject to its being done by a reasonable notice. Thirdly, once the right to serve a notice of the kind in question has arisen, the time allowed by the notice must be a reasonable time.

Certainly, down to the introduction of the 16th edition of the National Conditions of Sale, those propositions applied not only to an open contract of sale, or a contract which did not include conditions of this type, but also to a contract which incorporated the 15th edition of the National Conditions of Sale. The point came before Harman J. in *Smith v. Hamilton*.¹ I do not think I need read the facts of that case except to refer to condition 25 (1) of the National Conditions of Sale, 15th edition, which provided, in obviously different terms from the present edition, the following: "If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise directs) to the vendor . . . and the vendor may, with or without notice or

¹ [1951] Ch. 174.

“without previously tendering a conveyance, re-sell the property
“at such time, and in such manner and subject to such conditions
“as he shall think fit.”

The law is expressed by Harman J.² as follows: “If time be
“not of the essence of the contract initially, it follows, in my
“judgment, that one party cannot, of his own motion, make it
“so; to say that by writing a letter one party can make time of
“the essence when it was not so before, may be a convenient
“but is an inaccurate way of putting it. That has been pointed
“out on many occasions, and amongst others by Fry J. in *Green*
“v. *Sevin*.³ Fry J. said: ‘What right then had one party to
“‘limit a particular time within which an act was to be done
“‘by the other? It appears to me that he had no right so to do,
“‘unless there had been such delay on the part of the other
“‘contracting party as to render it fair that, if steps were not
“‘immediately taken to complete, the person giving the notice
“‘should be relieved from his contract. It has been argued
“‘that there is a right in either party to a contract by notice
“‘so to engraft time as to make it of the essence of the contract
“‘where it has not originally been of the essence, independently
“‘of delay on the part of him to whom the notice is given.
“‘In my view there is no such right. It is plain upon principle,
“‘as it appears to me, that there can be no such right. That
“‘which is not of the essence of the original contract is not to
“‘be made so by the volition of one of the parties, unless the
“‘other has done something which gives a right to the other to
“‘make it so. You cannot make a new contract at the will
“‘of one of the contracting parties. There must have been such
“‘improper conduct on the part of the other as to justify the
“‘rescission of the contract sub modo, that is, if a reasonable
“‘notice be not complied with. That this is the law appears to
“‘me abundantly plain.’” In the case before him, Harman J.
held that the purchaser had not been guilty of impropriety, and
therefore the notice by the vendors purporting to determine the
contract was not effective. It was argued in the present case
that condition 23 (1) in the 16th edition of the National Conditions
of Sale was framed with particular regard to that decision of
Harman J., and was intended to alter the law, drastically as it
seems to me, in favour of the vendor, with, it may be, disastrous
results to a purchaser who may not be in default at all, at any
rate until the date when the notice had been given. But it is
said that this condition (which, of course, has been accepted by

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² [1951] Ch. 174, 181.

³ (1879) 13 Ch.D. 589, 599.

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the purchasers in the present case, whether or not they appreciated the dangers implicit in it) enables a vendor to give notice at once on the date for completion and fix the unfortunate purchaser with the necessity of completing within a given time named by the vendor at his option and being not less than the period of 28 days. That may be so, but it seems to me that that provision is subject to this important consideration, that it still requires the vendor, in giving such a notice as this, to give a notice which must not in any case be less than 28 days, and must be reasonable having regard to all the circumstances of the case. It may cut out the need for the purchaser to be guilty of improper conduct and guilty of such delay that the law, apart from any special condition, would give the vendor a right to rescind the contract; but, in my view, giving the condition its proper construction, it still requires the notice to allow such a time as in all the circumstances is reasonable, which might not be less than 28 days but might well be more.

It has been contended by Mr. Foster on behalf of the vendors that the notice of 28 days' completion in the present case was reasonable because there were no particular conveyancing difficulties and therefore it was simple, so I think he argued, for the purchasers to complete within the time named of 28 days from February 1, 1956. But, in my view, that is not the right consideration. It is true that conveyancing difficulties may be some of the circumstances; but it seems to me that, in naming a period which suddenly gives a definite requirement for completion and makes time of the essence in this way, regard must be had to all the circumstances of the case, and to the practical considerations of the ability in the circumstances of the purchaser to find the money, having regard to reasonable behaviour as well as to mere conveyancing matters. In the present case, until a few days before the date fixed for completion, the purchasers were anticipating that they would be not fixed with the necessity of finding £50,000 cash down, but of finding perhaps a balance of £5,000 by reason of the provision of part of the price by a sub-sale of the property; and the facts of the negotiations of the sub-sale were within the knowledge of both parties as, indeed, the vendors were negotiating the sub-sale as agents for the purchasers and were, of course, one might observe, under a duty to use their best endeavours to secure a successful outcome to those negotiations. Suddenly those negotiations come to an end. The situation is entirely changed from the point of view of the purchasers and, indeed, also from the point of view of the vendors, because instead

of getting part of the price by virtue of the sub-sale they will now have to look to the purchasers to find £50,000; and, in these circumstances, it does not seem to me to be reasonable to fix such a short time as 28 days for a purchaser to find a sum of £50,000.

It seems to me, therefore, that the attempt of the vendors to rely on a condition of this type in such circumstances was mistaken; accordingly, in my view, the condition does not enable the vendors to act in the way in which they did and their notice was ineffective. The purchasers desire to complete the contract now, and therefore they are, in my view, entitled to have that opportunity, and the vendors were not entitled to rescind the contract and forfeit the deposit.

I therefore declare that the vendors' notice to complete was of no effect and that they have not effectively rescinded the contract between the parties, dated January 19, 1956.

Declaration accordingly.

Solicitors: *C. Butcher & Simon Burns; J. D. Langton & Passmore.*

J. L. D.

In re CALLAWAY.

CALLAWAY *v.* TREASURY SOLICITOR.

[1956 C. 131.]

*Administration of Estates—Murder of deceased—By next-of-kin—
Murder of testatrix by daughter, sole beneficiary under will—
Forfeiture of right to take under will—Claims to estate by next-
of-kin and Crown.*
Public Policy

A testatrix, by her will, appointed her daughter sole executrix and gave the whole of her estate to her absolutely. The only children of the testatrix were her daughter and one son. The daughter having murdered her mother and committed suicide, a summons was taken out by the son for a declaration that, on the true construction of the Administration of Estates Act, 1925, and in the events which had happened, the plaintiff was beneficially entitled to the estate of the testatrix to the exclusion of any interest of the Crown therein as *bona vacantia* :—

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Held, that the plaintiff was beneficially entitled to the whole estate of his mother as next-of-kin to the exclusion of any beneficial interest of the Crown therein.

ADJOURNED SUMMONS.

By her will, dated September 8, 1949, Emily Frances Callaway appointed her daughter, Jeanette Kathleen Stone, her sole executrix, and gave the whole of her estate to her absolutely. Mrs. Callaway lived at Bristol with her daughter and the infant son of her daughter. On March 8, 1954, they were all found dead from coal-gas poisoning in circumstances suggesting that Mrs. Stone had intentionally turned on the gas. Doors and windows were blocked up. Mrs. Callaway and the boy were in bed in night-clothes and Mrs. Stone was fully dressed.

In normal circumstances, if Mrs. Callaway had died intestate, her two children (namely, her daughter and her son, Albert Frank Callaway) would have shared her estate under the Administration of Estates Act, 1925.

On the ground, however, that a person could not benefit from his or her own crime, the Crown claimed to be entitled (as bona vacantia) to that half of Mrs. Callaway's estate which would have gone to Mrs. Stone.

A summons was taken out by Albert Frank Callaway, as administrator of the estate of Mrs. Callaway, in which he sought a declaration that, on the true construction of the Administration of Estates Act, 1925, and in the events which had happened, he alone was beneficially entitled to her estate to the exclusion of any beneficial interest of the Crown therein.

J. L. Arnold for the plaintiff. The applicant is in any case entitled to one-half of the estate, and he also becomes entitled to the other half (which would normally have passed to his sister). The rule, which arose out of the case of *Mrs. Maybrick (Cleaver v. Mutual Reserve Fund Life Association*¹), is that the sister's interest (i.e., the interest of the criminal) devolves as if there had been a lapse. The correct procedure is for the criminal to be struck out and, that having been done, for the persons entitled under the Act to be let in: see *In re Pollock*.² [Reference was also made to *In the estate of Crippen*³; *In re Sangal, decd.*⁴;

¹ [1892] 1 Q.B. 147; 8 T.L.R. 139.

² [1941] Ch. 219; 57 T.L.R. 359;
[1941] 1 All E.R. 360.

³ [1911] P. 108; sub nom. *In the estate of Cunigunda (or se. Cora Crippen, decd.)*, 27 T.L.R. 258.

⁴ [1921] V.L.R. 355.

*In re Schiff*⁵; *In re Sigsworth*,⁶ and *In re Merrett's Settlement Trusts*.⁷

Denys Buckley for the Crown. The evidence makes it clear that Mrs. Callaway died by the felonious act of her daughter, and in the events which have happened one-half of the estate of the testatrix is undisposed of and passes to the Crown as bona vacantia. The plaintiff is primarily entitled to one-half of the estate. Public policy does not require that his interest should be increased or an interest be created for his benefit. [Reference was made to the Administration of Estates Act, 1925, s. 47 (2) and (3).]

The plaintiff and his sister attained vested interests in their mother's estate, but the sister lost her right and could not be allowed to enjoy it. For the plaintiff to succeed, something has to be found in section 46 showing that he has become entitled to the whole of the estate; nothing is to be found which shows that. Since the sister cannot enjoy her half, the operation of the rule does not, in these circumstances, give the plaintiff more than that half to which he was already entitled: see the observations of Fry J. in *Cleaver v. Mutual Reserve Fund Life Association*.⁸ [Reference was also made to *In the estate of Hall*⁹; *In re Sangal, decd.*¹⁰; *In re Sigsworth*,¹¹ and *Milne v. Gilbert*.¹²] In *In re Sigsworth*¹³ Clauson J. kept the point now before the court expressly open.

Public policy cannot create new rights. Throughout the cases it is clear that the judges have taken the view that the criminal cannot claim to enforce a benefit. Nor is a benefit conferred on anyone else. The statutory powers must be applied as nearly as possible. On the grounds of public policy nothing is given to anyone else and one-half of this estate goes to the Crown as bona vacantia.

Arnold in reply. If the daughter takes nothing she cannot attain a vested interest. She takes nothing and the collaterals come in and take as if the testatrix had died intestate.

Cur. adv. vult.

May 16. VAISEY J. On March 8, 1954, the dead bodies of three persons were found in a gas-filled room in a house in the

⁵ [1921] 1 Ch. 149; 37 T.L.R. 31.

⁶ [1935] Ch. 89; 51 T.L.R. 9.

⁷ The Times, Nov. 3, 1955.

⁸ [1892] 1 Q.B. 147, 159.

⁹ [1914] P. 1; 30 T.L.R. 1.

¹⁰ [1921] V.L.R. 355.

¹¹ [1935] Ch. 89; 51 T.L.R. 9.

¹² (1852) 2 De G.M. & G. 715.

¹³ [1935] Ch. 89.

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City of Bristol. They were Emily Frances Callaway, a widow aged 73; her daughter, Jeanette Kathleen Stone, a married woman aged 44; and a son of Mrs. Stone, aged 13. The relevant evidence led irresistibly to the conclusion that Mrs. Stone had feloniously killed Mrs. Callaway, her mother, and also her son, and had then committed suicide. There was no evidence that Mrs. Stone was otherwise than of sound mind at the time when she committed the acts which I have mentioned. I have come to the conclusion, and the parties are agreed, that it is quite unnecessary for me to direct any inquiry or otherwise further to investigate the facts of the case, which are, indeed, quite plain. I am also satisfied that Mrs. Stone survived Mrs. Callaway, or must be presumed to have survived her under section 184 of the Law of Property Act, 1925.

Mrs. Callaway left a will dated September 8, 1949, appointing Mrs. Stone to be sole executrix and giving the whole of her estate to Mrs. Stone absolutely. The property of which Mrs. Callaway died possessed consisted both of realty and personalty and was of the value of about £4,000.

Under the rule based on public policy, to which I must presently refer, Mrs. Stone was undoubtedly precluded from taking any benefit under Mrs. Callaway's will, and on that assumption the plaintiff, Albert Frank Callaway, who was the only child of Mrs. Callaway other than Mrs. Stone, applied for a grant of letters of administration to her estate. On January 11, 1955, Karminski J. ordered that the grant should be made to him on the footing that he was beneficially entitled to the net estate of Mrs. Callaway on her intestacy. On March 15, 1955, a grant was made to the plaintiff expressly on the before-mentioned footing. Although it has no direct relevance to the case, I may observe that Mrs. Stone herself had made a will in favour of the plaintiff, which he proved on April 5, 1954. The statutory next-of-kin of Mrs. Callaway were her two children, namely, the plaintiff and Mrs. Stone, taking equally.

Now this rule, based on public policy, is that no person is allowed to take any benefit arising out of a death brought about by the agency of that person acting feloniously, whether it be a case of murder or of manslaughter. So much is plain; but there appears to be no satisfactory or complete authority as to the consequences arising from an application of that rule. The best exposition of the problem and of the difficulties which it involves is, I think, to be found in an Australian case; that is to say, in

the judgment of Harvey J. in *In re Jane Tucker, decd.*¹ After calling attention to the provisions of the civil law and referring also to the French law on the subject, he points out that the effect of the deprivation occasioned by the application of the rule was that in Roman law the property went to the State, while under the French law it went to the person who had a right to succeed next after the "heir" who lost his interest. It must be remembered that the civil law was applied in the ecclesiastical courts, and there is some reason to regard it as still governing such a point as the present. But the common law appears to be silent on the matter and to create no such disability except possibly in the case of a traitor. It would seem, surprisingly, that so far as can be found there is little trace of this doctrine in English law until it arose in the case of Mrs. Maybrick—*Cleaver v. Mutual Reserve Fund Life Association*.² From that authority I infer that the rule in this country is that the interest of the criminal passes as if there had been a "lapse," and in other cases it has been said that the name of the wrongdoer must be treated as "struck out." There might be cases in which the consequence of such "striking out" would be very uncertain, as, for instance, where the criminal had been entitled under his victim's will to a life interest with remainder to his own issue, so that the question might at once arise whether subsequently born issue of the struck-out wrongdoer would be excluded or not; and, indeed, this difficulty might arise on any possible view of the matter. It is, I think, unfortunate that in none of the cases to which I have been referred was the Crown represented to present the case which has been put forward here by the defendant, who is the Treasury Solicitor sued on behalf of the Crown. His case amounts to this, that the rule, properly understood, does no more than exclude the culprit and, while it may accelerate subsequent existing interests, it cannot create any new interests, with the consequence that the forfeited interest is one to which nobody is entitled and therefore goes to the Crown as bona vacantia.

It has not been argued, but I think that it might be a tenable view of the matter, that the application of the rule merely involved the transfer to the Crown of Mrs. Stone's interest under Mrs. Callaway's will, and that such transfer took precedence of and altogether excluded any intestacy or any rights arising under an intestacy. Why should Mrs. Stone's crime endow the plaintiff even to the extent of half of Mrs. Callaway's

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¹ (1921) 21 S.R.(N.S.W.) 175.

² [1892] 1 Q.B. 147.

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estate? Seeing that her crime was against the Queen's peace, why should not the Crown, rather than the plaintiff, get the benefit from it? I am bound to say that there seems to me to be great force in such an argument, as I will state presently. But, however logical it may be, I can find no authority in English law which justifies me in giving effect to it in such a case as the present. The point did arise in *In re Sigsworth*,³ where the facts were not dissimilar to those in the present case, and Clauson J., after deciding that the rule precluded a sane murderer from taking any benefit under his victim's intestacy, stated that the further question might arise whether the effect of the decision was that the guilty son should be treated as struck out of the Act, with the result of letting in the persons entitled under the Act, or whether the estate or the interest therein passed as bona vacantia to the Crown. He thought that, in the absence of the Attorney-General, the question could not be decided, but he ordered that the plaintiff might add the Attorney-General as a defendant for the purpose of enabling him to claim the estate on behalf of the Crown. It appears that advantage was not taken of this permission, and the point now falls to me to decide.

The plaintiff and Mrs. Stone being the persons entitled equally under Mrs. Callaway's intestacy, and Mrs. Stone being disentitled by the rule, I have, I suppose, to choose between two views, which are, first, that the plaintiff is alone qualified to take under the intestacy and, accordingly, is entitled to the whole estate, or whether Mrs. Stone's half is forfeited and goes to the Crown. In the present state of the authorities, which is far from satisfactory, I feel bound to adopt the former view. I do not consider the metaphorical expression "struck out" as being particularly happy or helpful, but it is difficult to suggest a more appropriate expression, although in a simple case such as the present it would be sufficient to say that the plaintiff must be treated as being the only qualified member of the class of Mrs. Callaway's issue, Mrs. Stone being wholly disqualified and therefore not to be reckoned or counted as a member of the class at all.

I have looked at one or two of the American cases, such as *Riggs v. Palmer*⁴ and *Ellerson v. Westcott*,⁵ but I do not think there is any clear guidance to be got from any of them. Other cases may be referred to, such as *In re Sangal, decd.*,⁶ and, of,

³ [1935] Ch. 89.

⁴ (1889) 12 Am.St.R. 819.

⁵ (1896) 148 N.Y. 149.

⁶ [1921] V.L.R. 355.

course, *In the estate of Crippen*.⁷ There is also the case of *In re Merrett's Settlement Trusts*.⁸ I get no real help either from *Beresford v. Royal Insurance Co.*⁹ or *In the estate of Hall*.¹⁰

As this point may hereafter be raised in a higher court, I venture with diffidence to say how, in the absence of authority, I should myself have desired to deal with it. First, as Mrs. Stone was not entitled to take the whole of Mrs. Callaway's estate according to the intention of Mrs. Callaway as expressed in her will, I would have treated that estate as wholly undisposed of and passing to the Crown as bona vacantia. Secondly, and in the alternative, on the footing that the Administration of Estates Act, 1925, comes into operation, I would have treated Mrs. Stone's moiety as undisposed of and passing to the Crown as bona vacantia, the plaintiff taking only the other moiety. That the plaintiff should take the whole seems to me both illogical and unmeritorious. For why, as I have already asked, should he be the person to profit by his sister's crime and the consequent frustration of his mother's testamentary intentions?

In the result, however, I must declare, in the terms suggested in the summons, that on the true construction of the Act and in the events which have happened, the plaintiff is beneficially entitled to the estate of Mrs. Callaway to the exclusion of any beneficial interest of the Crown therein.

Declaration accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills, for Sibley, Clough & Gibb, Bristol; Treasury Solicitor.*

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⁷ [1911] P. 108.

⁸ *The Times*, Nov. 3, 1955.

⁹ [1938] A.C. 586; 54 T.L.R.

789; [1938] 2 All E.R. 602.

¹⁰ [1914] P. 1.

PAVLIDES v. JENSEN AND OTHERS.

[1950 P. 1662.]

Company—Shareholder—Rights against company or directors—Sale of asset—Sale at undervalue—Allegation of negligence—Action by minority shareholder—Sale intra vires—No allegations of fraud or oppression—Whether action maintainable.

A minority shareholder of a company sought to bring an action on behalf of himself and all other shareholders, save three who

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were directors of the company, against these directors and the company for damages for negligence on the allegation that the directors had been guilty of gross negligence in effecting a sale of a valuable asset of the company at a price greatly below its true market value. The company was controlled by another company, the majority voting power of which was controlled by the same directors.

On an application by the defendants under R.S.C., Ord. 25, r. 2, for determination of the question whether on the facts alleged by the plaintiff the action was maintainable:—

Held, that since the sale of the asset in question was not beyond the powers of the company, and since there was no allegation of fraud on the part of the directors or appropriation of the assets of the company by the majority shareholders in fraud of the minority, the action did not fall within the admitted exceptions to the rule in *Foss v. Harbottle* (1843) 2 Hare 461, and that, accordingly, it was not maintainable.

Observations of Lord Davey in *Burland v. Earle* [1902] A.C. 83, 93 applied.

Observations of Jessel M.R. in *Russell v. Wakefield Waterworks Co.* (1875) L.R. 20 Eq. 474, 480, 482 considered.

Semble, that it is admissible in certain cases to go behind the apparent ownership of shares in order to discover whether a company is in fact controlled by wrongdoers—as, for instance, in the case where the shares were held by mere nominees bound to vote as the owners required them to vote.

ADJOURNED SUMMONS.

The plaintiff, Sir Paul George Pavlides, was the holder of 1,980 deferred shares in the capital of the defendant company, Tunnel Asbestos Cement Co. Ltd. (the company). The company was incorporated in 1935 under the Companies Act, 1929, as a company limited by shares. The capital of the company (certain redeemable preference shares having all been redeemed) consisted of 600,000 ordinary shares of 10 shillings each and 600,000 deferred shares of one shilling each all of which had been issued and paid up or credited as paid up in full. The deferred shareholders had, after the payment of a dividend of 5 per cent. to the ordinary shareholders, an equal interest with the ordinary shareholders in the profits of the company. But by article 74 of the company's articles the holders of the deferred shares were not entitled to receive notices of or to attend or vote in person or by proxy at any general meeting of the company. 578,000 of the ordinary shares and the greater part of the deferred shares were held by another company, Tunnel Portland Cement Co. Ltd.

The personal defendants Niels Max Jensen, William Thomas Charles Cave and James Asher Mackintosh were directors both of the company and also of Tunnel Portland Cement Co. Ltd.

On June 19, 1950, the plaintiff on behalf of himself and all other shareholders in the company except the defendant directors issued a writ against the first three defendants and the company for damages for negligence.

The complaint of the plaintiff related to a sale of an asbestos mine in Cyprus, which was acquired by the company (according to the statement of claim) in 1936 for about £142,000 and was resold in 1947 for about £182,000 to Cyprus Asbestos Mines Ltd., in which the company held 25 per cent. of the issued capital. This sale was carried through by the defendant directors, and was not submitted to the approval of the company in general meeting.

By the re-amended statement of claim the plaintiff alleged that the conduct of the defendant directors in effecting the sale was grossly negligent, in that it was a sale at a gross undervalue as the defendant directors well knew or ought to have known the true value of the mine (according to the plaintiff's allegations) having been "somewhere in the neighbourhood of £1,000,000."

The plaintiff claimed that he was entitled to the assistance of the court in the manner of this action because (1) he was unable to requisition or attend a general meeting of the company under its articles and (2) the alleged delinquent directors were in a position to control the company and so prevent the company from taking any action against them. The method of control alleged by the plaintiff in this respect was stated in para. 11 of the re-amended statement of claim as follows: "in that (i) at all material times "a majority of the ordinary shares of the defendant company " (which shares alone have at such times carried the right to " vote at general meetings of the company) have been and still " are held by the Tunnel Portland Cement Co. Ltd. and (ii) at " all material times the three personal defendants have been " directors of that company (the defendant Jensen being the " chairman of the directors thereof) and together able as such to " command a majority of votes at all meetings of the board " thereof except between the 13th day of April, 1953, and 31st " day of December, 1954. The three personal defendants were " and are thus in a position to control the exercise of the majority " voting power attached to the said shares so held by Tunnel " Portland Cement Co. Ltd."

The allegations of misfeasance were denied by the defendants, who applied under R.S.C., Ord. 25, r. 2, for the determination before the trial of the action of the following point of law:

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“ Whether on the facts alleged in the re-amended statement of
 “ claim the plaintiff was and is entitled to institute or maintain
 “ this action.”

Charles Russell Q.C. and *Kenneth Mackinnon* for the applicants. There is no reported decision in support of the proposition which the plaintiff must establish in order to succeed in this action, namely, that a minority shareholders' action is permissible whenever a minority disagrees with a majority on the question whether property of the company has been sold at an undervalue. On the authorities the plaintiff, in order to maintain his action, must show that the sale of the company's mine was either ultra vires the company or illegal, or that the transaction involved fraud on the part of the directors or fraudulent oppression of a minority. If it were otherwise it would be impossible for the domestic management of a company to be carried on, for a minority of the shareholders would be able to thwart the wishes of the majority upon every transaction and proceeding of the company with which it disagreed: see the following textbooks and authorities: Buckley on the Companies Acts, 12th ed., pp. 168-169; Gore-Browne, Handbook on Joint Stock Companies, 41st ed., pp. 382-386; Palmer's Company Law, 19th ed., p. 230; Palmer's Company Precedents, 16th ed., vol. 1, pp. 1037-1039; Halsbury's Laws of England, 3rd ed., vol. 6, pp. 418-420; *Burland v. Earle*¹; *Atwool v. Merryweather*²; *Gray v. Lewis*³; *Menier v. Hooper's Telegraph Works*⁴; *Russell v. Wakefield Waterworks Co.*⁵; *MacDougall v. Gardiner*⁶; *Mason v. Harris*⁷; *Spokes v. Grosvenor Hotel Co.*⁸; *Campbell v. Australian Mutual Provident Society*⁹; *Normandy v. Ind, Coope & Co. Ltd.*¹⁰; *Dominion Cotton Mills Co. Ltd. v. Amyot*¹¹; *Cook v. Deeks*¹²; *Foster v. Foster*¹³; *British America Nickel Corporation v. O'Brien*¹⁴; *Edwards v. Halliwell*.¹⁵

In the present case there is no question of ultra vires, illegality, fraud or fraudulent oppression, nor has there been any attempt

¹ [1902] A.C. 83; 18 T.L.R. 41.

² (1867) L.R. 5 Eq. 464n.

³ (1873) L.R. 8 Ch. 1035, 1050-1051.

⁴ (1874) L.R. 9 Ch. 350.

⁵ (1875) L.R. 20 Eq. 474, 478.

⁶ (1875) 1 Ch.D. 13.

⁷ (1879) 11 Ch.D. 97.

⁸ [1897] 2 Q.B. 124, 126, 128.

⁹ (1908) 77 L.J.P.C. 117; 24 T.L.R. 623.

¹⁰ [1908] 1 Ch. 84, 106, 108; 24 T.L.R. 57.

¹¹ [1912] A.C. 546, 549, 551; 28 T.L.R. 467.

¹² [1916] 1 A.C. 554, 561.

¹³ [1916] 1 Ch. 532, 546, 550.

¹⁴ [1927] A.C. 369, 371, 373; 43 T.L.R. 195.

¹⁵ [1950] W.N. 537; [1950] 2 All E.R. 1064, 1066.

to do anything pursuant to an ordinary resolution, which can only be done by way of a special resolution, nor are the alleged wrongdoers the holders of a majority of the shares in the defendant company. If proceedings such as the present action were maintainable it would open the door wide for polite blackmailing actions by minority shareholders who disagreed on certain questions of company policy. It is for the company in general meeting to decide, for example, whether directors should be sued in circumstances such as these, always excepting cases which involve an element of fraud. The present case must be considered as though the transaction in question had been previously agreed upon in general meeting. A minority shareholder could not sue in the absence of fraud. Similarly if the transaction was ratified subsequently. In both cases the answer to the present statement of claim would be that the company acted *intra vires*.

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The plaintiff must have brought these proceedings on the assumption that if a general meeting of the company had been held to determine whether the defendant directors should be sued the meeting would have voted against taking such action. The plaintiff, however, must show that that is something of which in law he can complain. But in these circumstances, in order validly to bring a minority shareholders' action it must be certain that a majority vote would be cast against bringing proceedings because the alleged wrongdoers are themselves the majority. The defendant directors, however, are not shareholders of the company; the shares are held by another company of which the defendants merely happen also to be among the directors.

The present proceedings are not within the admitted exceptions to the rule in *Foss v. Harbottle*¹⁶ and the action should be dismissed under R.S.C., Ord. 25, r. 3.

Raymond Walton for the respondent, the plaintiff. The plaintiff, by his statement of claim, alleges that the personal defendants have been guilty of gross negligence. The rule in *Foss v. Harbottle*¹⁶ is not disputed, but the admitted exceptions to it of fraud, illegality and *ultra vires* are not by any means exhaustive, and it is submitted that a minority shareholder's action will lie whenever the facts of the case warrant it. Strong reliance is placed on the observations of Jessel M.R. in *Russell v. Wakefield Waterworks Co.*¹⁷ In *Edwards v. Halliwell*¹⁸ Jenkins L.J. treats the rule in *Foss v. Harbottle*¹⁹ as by no means an inflexible rule but one which may be modified in the

¹⁶ (1843) 2 Hare 461.

¹⁷ L.R. 20 Eq. 474, 480, 482.

¹⁸ [1950] 2 All E.R. 1064, 1067.

¹⁹ 2 Hare 461.

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interests of justice. It is true that there appears to be only one reported decision in which a minority shareholder's action succeeded where neither fraud, illegality nor ultra vires was invoked, but that case, *Alexander v. Automatic Telephone Co.*,²⁰ carries added weight as an authority since charges of fraud were originally preferred against the directors but were later abandoned.

In the present case the plaintiff alleges that the directors were guilty of a very grave breach of duty in selling property of the company at much below its market value. *Alexander's* case²⁰ supports the proposition that in such circumstances it is not necessary to find fraud in order validly to bring an action where there is no other means of obtaining redress for a serious injury done to the company. The question might be asked: why, if the above proposition be good in law, is there to be found no decision in the reports of a case of gross negligence by directors as an exception to the rule in *Foss v. Harbottle*?²¹ The answer lies in the fact that before 1929 it was common form to insert in articles of association a clause absolving directors from the consequences of negligence. The law was altered in this respect by the Companies Act, 1929, in what is now section 205 of the Act of 1948. The law would be reduced to absurdity if a minority shareholder could only bring an action where a question of fraud, illegality or ultra vires was involved. Let it be supposed that a set of amiable lunatics obtained 51 per cent. of the shares of a company and thereupon deliberately but with the highest motives sold the company's products at greatly below cost price.

[DANCKWERTS J. An example might be a body of rabid teetotallers who obtained a controlling interest in a brewery company.]

Yes. It is submitted that in such circumstances a minority shareholder could bring an action for the injury done to the company.

The transaction complained of in the present case was not capable of being for the benefit of the company and a minority cannot be bound by it. Reliance is placed on the observations of Bowen L.J. in *Hutton v. West Cork Railway Co.*²² as showing that a minority are only bound to submit to the wishes of the majority where it can be shown that the acts complained of are reasonably incidental to the carrying on of business for the company's benefit.

²⁰ [1900] 2 Ch. 56, 62, 64, 69.

²² (1883) 23 Ch.D. 654, 672.

²¹ 2 Hare 461.

It was contended for the personal defendants that they are not shareholders of the company and that therefore ipso facto they cannot control it. But the defendants have a controlling interest in Tunnel Portland Cement Co., which holds a majority of the shares in the company. The correct date for ascertaining control is the date of the issue of the writ in the action, for otherwise there might thereafter be a change of control which would affect the action. True, the control of the defendants is a precarious control, since it could be interfered with by Tunnel Portland Cement Co. taking certain actions, for example, removing the defendants from the board of directors. But all control is precarious; until there is interference there is de facto control.

The present action, if successful, would not open the door to all polite actions of blackmail, as was suggested, since the plaintiff must first prove negligence. [Reference was also made to *Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd.*²³ and *Baillie v. Oriental Telephone and Electric Co. Ltd.*²⁴]

Russell Q.C. in reply. There may be sound business reasons why a company should wish to dispose of some of its property for so much less than its true market value; it may in the circumstances be a perfectly reasonable business transaction. Such a transaction would be intra vires the company. In the present case it is not suggested that what was done was ultra vires or a fraud on a minority. The observations of Jessel M.R. in *Russell v. Wakefield Waterworks Co.*²⁵ and of Jenkins L.J. in *Edwards v. Halliwell*²⁶ are obiter. *Baillie v. Oriental Telephone and Electric Co. Ltd.*²⁷ does not assist the plaintiff because in that case the acts complained of were illegal and ultra vires. The statements in paragraph 5 on p. 169 of Buckley cannot be supported on the authorities. If the exceptions to the rule in *Foss v. Harbottle*²⁸ be further extended the rule itself will cease to have any operation. [Reference was also made to *Greenhalgh v. Arderne Cinemas Ltd.*²⁹]

Cur. adv. vult.

May 14. DANCKWERTS J. read the following judgment. This is an application under R.S.C., Ord. 25, r. 2, for the determination of the following point of law: "Whether on the facts alleged in the re-amended statement of claim the plaintiff was

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²³ [1927] 2 K.B. 9; 43 T.L.R. 83.

²⁷ [1915] 1 Ch. 503.

²⁴ [1915] 1 Ch. 503, 518, 519; 31 T.L.R. 140.

²⁸ 2 Hare 461.

²⁹ [1951] Ch. 286, 291; [1950] 2

²⁵ L.R. 20 Eq. 474, 480, 482.

All E.R. 1120.

²⁶ [1950] 2 All E.R. 1064, 1067.

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“and is entitled to institute or maintain this action.” [His Lordship stated the facts and continued:] The allegations of negligence or misfeasance are denied by the defendants, but the defendants have asked for the decision of the point of law in this case with the object of determining the action and avoiding the expense of the trial. I have to deal with this application on the footing that the allegations in the statement of claim are true. It is agreed that I ought not to allow myself to be affected either by the smallness of the plaintiff’s apparent stake in the fortunes of the company or by any scepticism that I may feel as to the alleged magnitude of the defendants’ delinquency.

It is contended on behalf of the defendants that the matters in respect of which the plaintiff complains, and in particular the question whether proceedings should be taken against the directors, is a matter of internal management of the company, with which, on the principle stated in *Foss v. Harbottle*,¹ the court normally will not interfere. It is contended further on behalf of the defendants that the present case—based on negligence of directors—is not within the few recognized exceptions to the above-mentioned rule, namely, cases of *ultra vires*, illegality, or fraud (including fraudulent oppression of a minority by the majority of the shareholders). Further, it is said, the case is not a case where the control of the voting power is in the hands of the directors of the company whose actions are impugned; for they are not the shareholders; the shares are held by another company of which the defendant directors merely happen also to be among the directors.

For the plaintiff, it is contended that the above-mentioned exceptions are not exhaustive, and the court will grant relief wherever justice requires on any ground, and particularly where an otherwise helpless minority shareholder is in need of assistance by the court. As regards control, it is contended that, except for an immaterial period, the defendant directors, being a majority of the directors of Portland Tunnel Cement Co. Ltd. (the holders of the vast bulk of the shares of the company) were in a position to stifle any attempt to institute proceedings in the name of the company against them.

A number of textbooks and a very large number of decisions were cited to me, partly, of course, with the negative object of eliminating any precedent for the present action. In Buckley on the Companies Acts, 12th ed., pp. 168–169, the position is stated as follows: “1. If an act, which might be done with the approval

¹ (1843) 2 Hare 461.

“ of a majority, be done irregularly and without such approval,
 “ then the majority are the only persons who can complain, and
 “ the court will not entertain the complaint except at the instance
 “ of the majority, and in a proceeding in which the corporation is
 “ plaintiff. 2. In any proceeding brought to redress a wrong done
 “ to the corporation or to recover property of the corporation, or
 “ to enforce rights of the corporation, the corporation is the only
 “ proper plaintiff. Except that if (see rule 3, *infra*) an individual
 “ corporator sues the corporation to prevent it from doing some-
 “ thing *ultra vires*, e.g., to restrain it from carrying out an agree-
 “ ment with a third party, and joins that third party as a defen-
 “ dant, then as a necessary incident to the first part of the relief
 “ claimed, the court will go on to direct the repayment of money,
 “ or restoration of property paid or disposed of under the agree-
 “ ment. 3. A single shareholder suing on behalf of himself and
 “ others, or suing alone and not on behalf, may make the company
 “ a defendant and may restrain the company and directors from
 “ doing an act which is illegal, or criminal, or *ultra vires* the
 “ corporation, and which a majority are consequently unable to
 “ affirm. A stranger who is not specially damaged cannot sue,
 “ neither, *semble*, can a shareholder, who has with knowledge
 “ received and retains part of the proceeds of the *ultra vires* act,
 “ except to restrain future *ultra vires* dealings. If, however, a
 “ majority are opposed to the illegal act, *quaere* whether the com-
 “ pany should not be made, or at any rate joined, as plaintiff.
 “ 4. If the act complained of be not *ultra vires*, but be of a fraudu-
 “ lent character or a wrong done to the corporation, of which
 “ therefore the corporation alone upon the principles already stated
 “ can complain, yet if the alleged wrongdoers be themselves the
 “ majority, or turn the scale of the majority, then the minority
 “ may sue by one shareholder on behalf of himself and others.
 “ So also, *semble*, if a bare majority are purporting to do or
 “ authorize something inconsistent with the articles, though not
 “ *ultra vires*. *Semble*, one of the majority should be joined as a
 “ defendant. 5. The above are general rules strictly adhered to,
 “ but not inflexible, and any case in which the claims of justice
 “ require that an action in which the company is not plaintiff
 “ should be entertained may be made an exception. But if the
 “ case is one in which the company ought to sue, then (subject to
 “ rule 6) the shareholder must exhaust all reasonable means of
 “ obtaining the institution of an action by the company before
 “ suing himself. But if the case be one of class 4, it is idle to say

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" that a meeting ought to be called in which the alleged wrong-doers should not vote, for that would be trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried." I need not read rules 6 and 7, which follow. Subject to the doubts which I am about to mention, this passage seems to me to be a fair statement of the law on this subject.

Now, the phrases in the passage which I have quoted most favourable to the plaintiff in the present case are the reference to " a wrong done to the corporation," as well as cases of fraud and ultra vires, and the statement that the general rules stated are not inflexible and any case in which the claims of justice require that an action in which the company is not plaintiff should be entertained may be made an exception. It would appear that these are based on statements by Sir George Jessel M.R. in *Russell v. Wakefield Waterworks Co.*² In that case Sir George Jessel M.R. said of the rule in *Foss v. Harbottle*³: " that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the court doing justice." Later Sir George Jessel M.R. said (after referring to *Atwool v. Merryweather*⁴): " As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned judge who decided the case of *Foss v. Harbottle*." ⁵ These sound very general words, but judicial expressions must be read in the context in which they occur. In *Russell v. Wakefield Waterworks Co.*⁶ a shareholder in an incorporated company filed his bill on behalf of himself and all other shareholders against the directors and the promoters of a Bill in Parliament for a rival purpose, alleging an illegal payment of the company's money to such promoters to buy off their opposition and praying that it might be replaced. On a demurrer, Sir George Jessel M.R. held that the action was not maintainable on the allegations made, as (though the word " corrupt " was used) there was no allegation that the payments were fraudulent or ultra vires. He gave leave to amend the bill, but it is plain that he regarded the demurrer as final, unless the bill should be amended to raise a claim of fraud or ultra vires,

² (1875) L.R. 20 Eq. 474, 480, 482.

³ 2 Hare 461.

⁴ (1867) L.R. 5 Eq. 464n.

⁵ 2 Hare 461.

⁶ L.R. 20 Eq. 474.

both of which are, of course, recognized exceptions in which an action can be brought by a shareholder. It is, therefore, doubtful whether Sir George Jessel's observations should be applied to any wider field than such recognized exceptions to the rule in *Foss v. Harbottle*.⁷

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The wide expressions used in *Buckley* on the Companies Acts and by Sir George Jessel M.R. in the above-mentioned case are not supported by the statement of the law by Lord Davey in the Privy Council case of *Burland v. Earle*,⁸ where he says: "It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle*⁹ and *Mozley v. Alston*,¹⁰ and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraph Works*."¹¹

⁷ 2 Hare 461.⁸ [1902] A.C. 83, 93; 18 T.L.R.⁹ 2 Hare 461.¹⁰ (1847) 1 Ph. 790.¹¹ (1874) L.R. 9 Ch. 350.

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These observations, indeed, indicate how the principles involved may easily be misstated. Lord Davey refers to an action by shareholders (instead of the company) being allowed "in order" "to give a remedy for a wrong done which would otherwise escape "redress." But he points out that this is purely a matter of procedure, and he expressly confines the cases in which such proceedings can be brought to those in which the acts complained of are of a fraudulent character (in which he includes appropriation by a majority in fraud of the minority of the shareholders) or beyond the powers of the company. Where the act complained of is within the powers of the company and the intention of the majority of the shareholders, in other cases than these exceptions the action is not maintainable. Lord Davey adds¹² that, "Unless "otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to "carry a resolution by the circumstance of his having a particular "interest in the subject-matter of the vote."

On the facts of the present case, the sale of the company's mine was not beyond the powers of the company, and it is not alleged to be *ultra vires*. There is no allegation of fraud on the part of the directors or appropriation of assets of the company by the majority shareholders in fraud of the minority. It was open to the company, on the resolution of a majority of the shareholders, to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of the majority to decide that, if the directors by their negligence or error of judgment had sold the company's mine at an undervalue, proceedings should not be taken by the company against the directors. Applying, therefore, the principles as stated by Lord Davey, it is impossible to see how the present action can be maintained.

I have examined again all of the large number of authorities which were cited to me in the course of the arguments. Though there are to be found, in one or two instances, observations which at first sight might justify a more liberal view of the extent of minority shareholders' rights, when taken out of their context, I do not think any of the authorities justify any conclusion other than that which I have reached.

That really disposes of the matter, and it is not really necessary to consider whether, on the allegations contained in the re-amended statement of claim, the defendant directors can be said to have such control of the company as to require (in any

¹² [1902] A.C. 83, 94.

appropriate case) the allowance of an action by a minority shareholder. The defendant directors are not in fact the holders of the shares, the voting power of which would settle the company's decision. I think that it must be admissible in certain cases to go behind the apparent ownership of shares in order to discover whether a company is in fact controlled by wrongdoers—as, for instance, in the case where the shares were held by mere nominees, bound to vote as the owners required them to vote. In the present case, the shares are held by a company of which the defendant directors were, for the greater part of the material period, not only directors, but sufficient in number to out-vote the other directors, of the shareholding company. In this manner, it is said they could prevent the shareholding company passing any resolution which might result in proceedings being taken in the name of the company which is alleged to have been injured against them. I suppose the shareholders of the shareholding company could in general meeting decide differently and disagree with the decision of the directors of that company. I am not satisfied that the defendant directors are in such control of the company as is necessary to justify an action by a minority shareholder, but I need not decide this question.

In the result, I reach the conclusion that on the facts alleged in the re-amended statement of claim the action is not maintainable by the plaintiff; and I ought to dismiss the action under R.S.C., Ord. 25, r. 3.

Order accordingly.

Solicitors: *E. F. Turner & Sons; Stibbard, Gibson & Co.*

J. A. G.

In re H. L. BOLTON ENGINEERING CO. LTD.

[No. 0043 of 1956.]

Company—Winding up—Petition—Trustee in bankruptcy, by—Refusal by company to register trustee as holder of bankrupt's shares—Locus standi of trustee to present petition—"Contributory"—Companies Act, 1948 (11 & 12 Geo. 6, c. 38), ss. 212, 213, 215, 216, 224 (1) (a) (ii).

Bankruptcy—Trustee in bankruptcy—Presentation of petition to wind up company.

The trustee in bankruptcy of a shareholder in a limited company presented a petition for the compulsory winding up of the company.

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The company had not acceded to the trustee's request to be registered as the holder of the shares held by the bankrupt, and objected to the making of the winding-up order on the ground that the trustee had no locus standi to present the petition:—

Held, that the powers of a trustee under section 216 of the Companies Act, 1948,¹ to represent a bankrupt contributory "for all the purposes of the winding up" could only come into effect after a winding-up order had been made; so that a trustee who had not obtained registration of the bankrupt's shares in his own name had no locus standi as a contributory to present a petition.

PETITION.

On January 19, 1956, a petition was presented by the official receiver as trustee of the property of one Henry Lorraine Bolton, who was adjudicated bankrupt on July 27, 1950, for an order

¹ Companies Act, 1948, s. 212:

"(1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up . . ."

S. 213: "The term 'contributory' means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory."

S. 215: "(1) If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives, and the heirs and legatees of heritage of his heritable estate in Scotland, shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly."

S. 216: "If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories,—(a) his trustee in bankruptcy shall represent him for all the purposes of the winding up, and shall be a contributory accordingly, and may be called on to

"admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company . . ."

S. 224: "(1) An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately: Provided that—(a) a contributory shall not be entitled to present a winding-up petition unless— . . .

"(ii) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder."

S. 455: "(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say):— . . . 'contributory' has the meaning assigned to it by section two hundred and thirteen of this Act."

for the compulsory winding up of H. L. Bolton Engineering Co. Ltd. ("the company"). The company, which was incorporated in 1946, had a nominal capital of £7,000, divided into 6,900 preference shares of £1 each held by the bankrupt and 100 ordinary shares of £1 each held by members of his family, all issued and fully paid up or credited as fully paid up. The company had not acceded to the trustee's request to be registered as the holder of the said 6,900 preference shares.

On the hearing of the petition, counsel on behalf of the company stated that they were prepared, without making any admissions, to proceed upon the basis that the allegations contained in the petition were true, and that, if the court were against them on a point of law, which they wished to raise by way of demurrer, namely, that the trustee in bankruptcy had no locus standi to present the petition, the company would not further resist the making of a compulsory order.

Raymond Jennings Q.C. and *Nigel Warren* for the company. It is conceded that a trustee in bankruptcy is a contributory within the meaning of section 213 of the Companies Act, 1948, for it is established under the Bankruptcy Act, 1914, that calls either present or future are debts provable in the bankruptcy and it matters not that the bankruptcy precedes the winding up or the winding up the bankruptcy, since in either case calls present or future are provable debts: see *In re Mercantile Mutual Marine Insurance Association*²; *In re McMahon*.³ In these circumstances it would be difficult to contend that the trustee in bankruptcy of a holder of shares was not a contributory. That fact, however, does not suffice to enable the present petitioner validly to apply for the winding up of the respondent company, since he is unable to bring himself within the proviso to section 224 (1) of the Act; the shares in question were not originally allotted to him nor have they been held by him for the prescribed minimum period of six months, or at all. Accordingly, the trustee has no locus standi to present the petition.

The provisions of section 216 are of no assistance to the petitioner, for its language plainly presupposes the existence of a winding up and is a reference forward to the series of administrative provisions contained in sections 257 to 266 inclusive, which closely concern the interests of contributories. This construction of section 216 is supported by the analogous wording of section

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² (1883) 25 Ch.D. 415.

³ [1900] 1 Ch. 173; 16 T.L.R. 73.

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215 (1). This latter section plainly only applies where a member dies *after* the company has gone into liquidation; it is to be noted that the personal representative of a deceased member is expressly enabled to present a petition by the concluding words of section 224 (1) (a) (ii). If by virtue of the language of section 215 the personal representative of a deceased member was able to present a petition it would have been unnecessary to make any express provision in section 224. The fact that section 224 is silent as to the right of a trustee in bankruptcy to present a petition is a further indication that section 216 gives no such right, bearing in mind the similarity in language of that section and section 215 (1). [Reference was also made to section 212 of the Act; Buckley on the Companies Act, 12th ed., p. 441; *In re a Company*⁴; *In re Cooper (Cuthbert) & Sons Ltd.*⁵; *In re Norwich Yarn Co.*⁶; *In re National Savings Bank Association*⁷; *In re Anglesea Colliery Co.*⁸]

C. A. Settle for the petitioner. The right of a trustee in bankruptcy to present a petition for winding up is conferred by section 216 of the Act, and that is the reason for the omission, which, it is submitted, is deliberate, of that class of person from the provisions of section 224. The language of section 216 is very wide; the phrase "shall represent him for all the purposes of the "winding up" includes the right to present a petition. It is true that the opening words of section 215 are similar to those of section 216, but the object of section 215 is quite different; it is concerned exclusively with liability to make payments, and it does not in terms give powers to personal representatives for the purposes of the winding up. Because of this distinction between section 215 and section 216 it was necessary to insert a reference to personal representatives in section 224.

The trustee is a contributory for the purposes of winding up, but the bankrupt is a contributory for all other purposes. It is established that a bankrupt cannot present a petition for winding up, and, therefore, that is the reason for the wide language of section 216. [Reference was also made to Buckley on the Companies Acts, 12th ed., p. 441; *Martin's Patent Anchor Co. Ltd. v. Morton*⁹; *Hastie's Case*¹⁰; *Financial Corporation Ltd. v.*

⁴ [1894] 2 Ch. 349, 350, 351.

⁵ [1937] Ch. 392; 53 T.L.R. 548;
[1937] 2 All E.R. 466.

⁶ (1850) 12 Beav. 366.

⁷ (1866) L.R. 1 Ch. 547, 549, 551.

⁸ (1866) L.R. 1 Ch. 555.

⁹ (1868) L.R. 3 Q.B. 306.

¹⁰ (1869) L.R. 4 Ch. 274.

*Lawrence*¹¹; *In re Wala Wynaad Indian Gold Mining Co.*¹²; *Morgan v. Gray*.¹³]

Jennings Q.C., in reply, cited *In re Wala Wynaad Indian Gold Mining Co.*¹⁴

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March 13, 1956. WYNN-PARRY J. read the following judgment. At an early stage of the hearing of this petition, Mr. Jennings, on behalf of the respondents (to whom I will refer as "the company") intimated that he was prepared, without making any admissions, to proceed upon the basis that the allegations in the petition were true, and that, if I were against him on the point, which he wished to raise by way of demurrer, he would not further resist the making of a compulsory order.

I am, therefore, concerned only with a question of law, which can be put thus: Has the petitioner, who has presented this petition in his capacity of trustee in bankruptcy of one Henry Lorraine Bolton, to whom I will refer as "the bankrupt," the holder of 6,900 fully paid up preference shares of £1 each in the capital of the company (the remainder of its capital, consisting of 100 ordinary shares of £1 each, being spread among members of the bankrupt's family) any locus standi as such trustee in bankruptcy to present this petition?

The question, which is an interesting one, does not appear ever to have come before the courts for consideration. Section 224 of the Companies Act, 1948, deals with the persons and bodies by whom a petition for the compulsory winding up of a company may be presented. [His Lordship read the relevant parts of the section and continued:] Prima facie, at any rate, that section would appear to be designed to provide an exhaustive list of those who are entitled to present a petition for compulsory winding up. If the petitioner is to qualify as a person entitled to present such a petition, it must be on the ground that he is a contributory at the time when he presents the petition. Having regard to the provisions of section 455, the definition section, it is necessary to refer to section 213 for the definition of "contributory." This section reads as follows: "The term 'contributory' means every 'person liable to contribute to the assets of a company in the 'event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final

¹¹ (1869) L.R. 4 C.P. 731.

¹² (1882) 21 Ch.D. 849.

¹³ [1953] Ch. 83; [1953] 1 All E.R. 213.

¹⁴ 21 Ch.D. 849.

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“determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.”

In order, in turn, to find out who is liable to contribute to the assets of a company in the event of its being wound up, it is necessary to turn back to section 212, where it is provided that, subject to a number of expressed qualifications, which I need not pause to consider, every present and past member shall be so liable. The emphasis is upon membership; but, if the matter stood only on sections 212 and 213, there would be difficulty in the administration of the affairs of a company in liquidation as regards contributions from the estates of a deceased contributory, and as regards a contributory who had become bankrupt, and whose property was vested in, and whose affairs were being administered by, a trustee in bankruptcy. Some further provision in the Act was therefore necessary to deal with these two categories of cases. The first category is dealt with by section 215 (1). [His Lordship read the subsection and continued:] In construing this section, it should be borne in mind that the right of a personal representative of a deceased shareholder to present a petition is expressly given by section 224. Bearing in mind that circumstance, having regard to the phrase “either before or after he has “been placed on the list of contributories,” having regard further to the limited object of the subsection, namely, to establish the liability of the personal representative to contribute in a due course of administration, and having regard, finally, to the consequential provision with which the subsection ends, I am of opinion that the section only begins to operate if and when a winding up supervenes.

I have felt it advisable to construe section 215 because of the necessity of construing section 216, and because, in my view, the construction of section 215 bears upon the construction of section 216, to which I now turn. This is the section upon a particular construction of which Mr. Settle rested his submission that the petitioner as trustee in bankruptcy had a locus standi to present the petition. Section 216, so far as material, reads as follows: “If a contributory becomes bankrupt, either before or “after he has been placed on the list of contributories,—(a) then “his trustee in bankruptcy shall represent him for all the purposes of the winding up, and shall be a contributory accordingly, “and may be called on to admit to proof against the estate of “the bankrupt, or otherwise to allow to be paid out of his assets “in due course of law, any money due from the bankrupt in

“respect of his liability to contribute to the assets of the
“company.”

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Mr. Settle's submission, put shortly, is that, admitting, as he must, that the case of a trustee in bankruptcy as such is not dealt with by section 224 (1) (a) (ii), the omission is deliberate, on the ground that the right to present a petition has already been conferred on a trustee in bankruptcy by section 216. To support this contention he submits that the words “shall represent him for all purposes of the winding up” must include the right to present a petition. I am unable to accept this construction. In the first place, it would represent a very odd method of drafting, if it had to be said that the legislature had omitted from the apparently exhaustive list in section 224 of those who have the right to present a petition, a particular class, because that right had already been given to that class, and to that class alone, and only then by implication and not expressly. In the second place, this section, like section 215, contains the phrase “either before or after he has been placed on the list of contributories,” and it is a phrase which, while perhaps not of itself decisive, points at any rate to a period of time at which a winding up is in existence. In the third place, the first operative provision is that the trustee is to represent, that is, stand in the shoes of the bankrupt, for what?—for all purposes of the winding up—not, be it marked, a winding up. In the fourth place, it must be remembered that upon a member of a company becoming bankrupt, the company being still a going concern, he does not by reason only of his bankruptcy cease to be a member: *Morgan v. Gray*.¹ It is he and not his trustee in bankruptcy who is and continues to be the contributory. Apart from such an event as the trustee in bankruptcy becoming registered in respect of the bankrupt's shares, the position only changes on the company going into liquidation and then only to a limited extent. The name of the bankrupt may appear on the list of contributories, but he is treated as a stranger to the company (see *In re Cape Breton Co.*²), and is represented by his trustee in bankruptcy for the purposes of the winding up, for example, the administrative provisions contained in sections 257 to 277 of the Companies Act, 1948, and the trustee becomes a contributory accordingly. The vital point is the event of winding up. Until then, assuming that the trustee does not obtain registration of the bankrupt's shares

¹ [1953] Ch. 83; [1953] 1 All E.R. 213. ² (1881) 19 Ch.D. 77.

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in his name, it is he and not the bankrupt who is stranger to the company, and as such he can have no locus standi to present a petition as a contributory.

A number of authorities were cited in argument, but I agree with counsel that they do not really help towards the solution of the problem with which I have to deal, which essentially depends for its solution on the true construction of the sections of the Act to which I have referred.

I would only add that I have difficulty in accepting the statement in Buckley on the Companies Act, 12th ed., p. 441: "A shareholder does not become a contributory until the winding up." I express this difficulty with considerable hesitation, because the statement on which it is clearly based appears at any rate as far back as the 7th edition, an edition, indeed the last, edited by the author himself; but I fail to see anything in the language of sections 212 and 213 which operates to limit the period during which a person is to be regarded as a contributory to a period beginning with the commencement of the winding up of the company, nor can I appreciate, if the period is so limited, how any person could present a petition under section 224 as a contributory. It would, I think, be more accurate to say that a shareholder does not become liable, if at all, as a contributory until there is a winding up.

In the result the petition must be dismissed, with costs.

Petition dismissed.

Solicitors: *Tarry, Sherlock & King; Stafford Clark & Co. for Faber & Co., Birmingham.*

J. A. G.

In re INGLETON CHARITY.
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June 19.

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[1955 R. No. 793.]

Charity—Education—School site—Land granted for school—Closure of school—Reverter of land under School Sites Act—Possessory title claimed by vicar and churchwardens—Sale of land—Declaration by trustees that proceeds of sale held on fresh trusts—Original trusts not terminated by closure of school—School Sites Act, 1841 (4 & 5 Vict. c. 38), ss. 2, 7—Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 5 (as amended by the Education (Miscellaneous Provisions) Act, 1948 (11 & 12 Geo. 6, c. 40)).

Education—School—Closure of school—Original trusts relating to land not affected.

Certain land was granted, pursuant to the School Sites Act, 1841,¹ by a deed of grant dated August 11, 1846, to the minister and chapel wardens of the district (now the vicar and churchwardens of the parish) of Ingleton and their successors for a site for a school for poor persons in the district "and for no other "purpose." The school was carried on in premises on the land until 1929, when it was closed. The property was used for various parochial purposes until 1932, and was later let to a limited company to whom it was eventually sold in 1952. The vicar and churchwardens for the time being considered that after the closure of the school the property had reverted to the estates of the grantors under section 2 of the Act, but that no claim having been made, they had acquired a possessory title by adverse possession, and that the closure of the school having brought about the termination of the original trusts they were entitled to hold the property or proceeds of sale on fresh trusts (namely, for the purposes of the parish) which they declared in a deed dated December 20, 1952:—

Held, that the vicar and churchwardens and their successors who were named in the deed of grant of 1846 remained trustees of the trusts declared by that grant, and it was not therefore open to them to deny those trusts and claim that they held the property or the proceeds of sale of it on any trusts other than those under the grant of 1846.

Attorney-General v. Price [1912] 1 Ch. 667; 28 T.L.R. 283 applied.

¹ School Sites Act, 1841, s. 2:
" . . . any person, being seised in fee
" simple . . . of and in any manor
" or lands . . . and having the
" beneficial interest therein . . . may
" grant . . . any quantity . . . of
" such land, as a site for a school
" for the education of poor persons
" . . . provided . . . that upon the
" said land . . . ceasing to be used

" for . . . [such purpose], the same
" shall thereupon immediately revert
" to and become a portion of the said
" estate held in fee simple . . . or of
" any manor or land as aforesaid, as
" fully to all intents and purposes as
" if this Act had not been passed,
" any thing herein contained to the
" contrary notwithstanding."

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Certain land in the parish of Ingleton, in the county of York, was granted on August 11, 1846, by the Lords of the Manor of Ingleton, pursuant to the School Sites Act, 1841, to the minister and chapel wardens of the district and their successors (now the vicar and churchwardens of the parish of Ingleton) to be applied "as a site for a school for poor persons of and in the said district" and for no other purpose whatsoever such school to be always "in union with the National Society for Promoting the Education of the Poor in the Principles of the Established Church" and to be conducted according to its principles and for the "furtherance of its ends and designs."

By that conveyance, and by virtue of section 7 of the School Sites Act, 1841, the school was held by the vicar and churchwardens from time to time of the parish; and the estate, pursuant to the statute, automatically vested in the vicar and churchwardens for the time being without any transfer or conveyance.

The school was carried on according to the provisions of the deed until it was finally closed on December 20, 1929. After that date the property was used as a Sunday school and for meetings of the parochial church council of the parish of Ingleton and for social gatherings in connexion with the church of the parish until November 1, 1932. On that date the property was let by the vicar and churchwardens for the time being to the Westmorland Territorial Association on a yearly tenancy, with the reservation of the right to use the premises for a Sunday school and for other occasional purposes. That user continued until 1940, when the property was requisitioned by the War Department; it was derequisitioned on April 1, 1946, and was let by the then vicar and churchwardens to a limited company, Parkland Manufacturing Co. Ltd. In 1952 the land was sold to that company for the sum of £6,500; and the balance remaining after payment of legal and other costs was invested by the vicar and churchwardens in Consols. On December 20, 1952, they executed a declaration of trust declaring that the Consols or the investments for the time being representing the same and the income thereof be held on trust for the purposes of the parish of Ingleton.

The vicar and churchwardens considered that after the closure of the school in 1929 the property had reverted, under section 2 of the School Sites Act, 1841, to the estates of the grantors of the grant of August 11, 1846, and (no representatives of the

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grantors having ever made a claim to the property) that they had acquired a good title to the said property by adverse possession, and were thus entitled to make the declaration of trust of December 20, 1952. The Minister of Education had expressed the view that the vicar and churchwardens had no power without the consent of the Minister to sell the property or execute the declaration of trust, and that the Consols were held on the same trusts as the property was held immediately before the sale, and accordingly that the trusts of the deed of 1846 remained applicable.

In the circumstances the vicar and churchwardens took out the present summons asking the court: (1) Whether on the true construction of the grant of 1846 and the School Sites Acts, and in the events which had happened, the freehold property known as the Ingleton Old National School (which formed the endowment of the said charity) was, immediately before the conveyance or purported conveyance on sale thereof in 1952 to the Parkland Manufacturing Co. Ltd., held by them (a) on trust to apply the same for the purposes of education, so as to constitute the property as an educational endowment within the meaning given to that expression by section 5 of the Endowed Schools Act, 1869 (as amended by the Education (Miscellaneous Provisions) Act, 1948); or (b) on trust to apply the same for ecclesiastical purposes within the parish of Ingleton; or (c) on trust to sell the same and to stand possessed of the net proceeds of sale and of the net rents and profits thereof until sale on trust for themselves as joint tenants beneficially.

W. S. Wigglesworth for the vicar and churchwardens. On the closure of the school in 1929 there was a reverter of the property under section 2 of the School Sites Act, 1841, to the estate of the grantors, and the question of principle which arises is whether the vicar and churchwardens who remained in possession after the closure and claim that they hold the property against the family of the grantors have established that they hold it on new ecclesiastical trusts, that is, for the benefit of the parish of Ingleton.

[DANCKWERTS J. Do you mean that they hold them by adverse possession?]

Yes, the estate of the grantors is not before the court.

[DANCKWERTS J. Ought it not to be?]

It has not been possible to discover the grantors or anyone representing their estate.

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After the school had been closed for some 23 years the vicar and churchwardens considered that they were entitled to sell the property, and they claim to hold the proceeds of the sale on new trusts which they have established. The question is, therefore, what trusts attached to the premises immediately before the sale.

Under the School Sites Act the vicar and churchwardens were a corporation aggregate for the purpose of holding land, and when the property reverted to the estate of the grantors by the closure of the school that statutory corporation became dissolved and the trusts of the deed of 1846 were therefore wholly spent. The grantors could do what they liked with the land, and so could anyone else who had possession adversely to them. The trusts of the deed having come to an end after the discontinuance of the school, the vicar and churchwardens did not remain in possession under the School Sites Act; the slate was clean and anyone who possessed the land could hold it for his own use and benefit.

The whole method of ownership was changed; immediately before the closure of the school this land was held by the vicar and churchwardens in a particular manner under the Act as a corporation aggregate. Immediately after the closure it was not held by them as a corporation aggregate under the Act, but as three individuals, who during the period succeeding the closure established by usage new charitable trusts for the benefit of the parish.

[DANCKWERTS J. What authority had they to hold it for any other purposes than the original trusts?]

It was vacant land which anyone could seize; the reverter does not have to be set up; it merely took place: see section 2 of the School Sites Act, 1841.

The vicar and churchwardens did not remain in possession on void trusts, but were in possession in succession to trusts which had completely ceased and had no provisions applicable to the property after 1929.

None of the cases afford any particular guidance. *Attorney-General v. Edalji*² is distinguishable on three grounds: (1) there was no reference at all to reverter in that case and the question of reverter was not argued; (2) it was not a case under the School Sites Act; and (3) the vicar and churchwardens had not used the property for new ecclesiastical trusts; they had apparently never used it at all.

² (1907) 97 L.T. 292; [1907] W.N. 174.

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*Attorney-General v. Price*³ is distinguishable because there had been no actual reverter of the property although the danger of reverter was feared. That is an unsatisfactory case as an authority, in that Swinfen Eady J. was only overruled by a majority in the Court of Appeal, and the case was settled when it went to the House of Lords, so that there is nothing to show whether the latter would have agreed with Swinfen Eady J. and Buckley L.J. on the one hand, or the majority of the Court of Appeal on the other.

After the closure of the school the vicar and churchwardens were accordingly entitled, in the circumstances that no claim was made on behalf of the estate of the grantors, to acquire the property by adverse possession for the purposes of an ecclesiastical parish charity.

Denys Buckley for the Attorney-General. It is a fallacy that there was ever vacant land. On December 19, 1929, the vicar and churchwardens were in possession as trustees under the original grant; on December 20, 1929, after the closure of the school, they were still in possession as trustees, and they had a title against all the world except the grantors; but they had lost the legal estate.

[DANCKWERTS J. They had lost their paper title, but the trusts of the original grant were still subsisting.]

The position is similar to that in *Attorney-General v. Price*,³ where the purpose of the trust prescribed in the deed, a school for children and adults of the poorer classes, was held to have failed; and Cozens-Hardy M.R. said that whatever might be the rights of some person not before the court under the reverter clause, the trustees so long as they remained in possession under the deed were bound by the trusts declared by the deed, as varied by the court. The court there made an order for a *cy-près* application, but that would not be possible if the trusts of the deed were to be held to have come to an end.

It was argued in the present case that the vicar and churchwardens were entitled to create a title for themselves against their trust, but the court never allows trustees to rely on a *jus tertii* against their right as trustees.

[He was stopped.]

DANCKWERTS J., having stated the facts, continued: The position now is that the Minister of Education contends that the vicar and churchwardens had no authority to sell the land as

³ [1912] 1 Ch. 667; 28 T.L.R. 283.

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they did, because they did not obtain either the consent of the court or the Charity Commissioners or the Board or Minister of Education. The present summons has been taken out by the vicar and churchwardens, making the Attorney-General a defendant, for the purpose of finding out what were the trusts applicable to the land after the closure of the school on December 20, 1929, because if that question can be decided, the matter can be cleared up without any disturbance of the title of the company to whom the property was sold and conveyed in 1952.

It is contended by Mr. Wigglesworth on behalf of the vicar and churchwardens that on the termination of the use of the property as a school they were in possession of the property, and retained possession in such a way that they acquired a possessory title under the Real Property Limitation Acts which would be good against the successors in title of the Lords of the Manor, even on the assumption that the right of reverter given by section 2 of the School Sites Act, 1841, had operated immediately on the closing of the school on December 20, 1929. Alternatively, he contended that they acquired a title by their possession, not as trustees for the school, but as trustees on fresh trusts created by user and the manner in which they employed the property, not for the school but for general church purposes in the parish, and that, therefore, they had full power to make the declaration of trust on December 20, 1952, because they could declare any trusts that they liked.

The successors of the Lords of the Manor are not parties to these proceedings, and therefore I am proceeding on an assumption that the right of reverter operated on December 20, 1929, but that the title of the Lords of the Manor's successors was ousted by the possession for the statutory period and longer by the vicar and churchwardens.

There is no doubt that persons who happen to be trustees can acquire a possessory title. That was decided by (amongst other cases) *Churcher v. Martin*,¹ where there was a conveyance for charitable purposes which, owing to the absence of compliance with the formalities of law, was not effective and consequently conveyed no title to the trustees in question. The trustees remained in possession for the statutory period, and it was held that they had acquired a possessory title, but that it was held by them on the trusts for which they had been made trustees by the transaction in question.

¹ (1889) 42 Ch.D. 312.

The case as put by Mr. Wigglesworth depends on my being convinced that, on the closing of the school and the automatic operation of the right of reverter to the successors of the Lords of the Manor, there was a complete break, as I see it, so that the persons who remained in occupation (who, I should observe, are not the same vicar and churchwardens throughout, but varied from time to time as there were changes in their personality) started a fresh title to the land, either for fresh purposes for their benefit or on fresh trusts which in no way were tied to the trusts which were contained in the deed of grant of August 11, 1846. Those contentions are not supported, so far as I can see, by any case, and are contrary to the decisions in two cases to which I am about to refer, and entirely contrary to the view which I formed upon the case when it was presented to me.

It seems to me that the vicar and churchwardens remained in occupation of the property, carried out the lettings and the other dealings with the property, because they were trustees under the deed of 1846 and for no other reason. They were the trustees of that deed and they carried on as trustees. It is true that their paper title came to an end, owing to the operation of the School Sites Act, when the school was closed, but they then held the land under a pure right of possession. Their right, none the less, was good against everybody in the world except persons who could claim successfully through the Lords of the Manor. They simply carried on in the same capacity as trustees on the trusts of the deed, which required them to use it for the purposes of the school, unless and until those trusts were varied in a manner authorized by law; that is, by means of a scheme settled by the court or the Minister of Education, or, at the appropriate time, the Board or Minister of Education.

Mr. Wigglesworth referred me to two cases, both of which he admitted to be against him but which he sought to distinguish. The first is *Attorney-General v. Edalji*² and the other one is *Attorney-General v. Price*,³ which was settled when it went to the House of Lords.⁴ He sought to distinguish those cases in the first instance because there was no mention in the case of *Attorney-General v. Edalji*⁵ of either the School Sites Act or the right of reverter. From a perusal of the terms of the relevant document in that case it appears to me that it was almost certain that it must have been a grant under the powers conferred

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² (1907) 97 L.T. 292; [1907] W.N.⁴ [1914] A.C. 20; 30 T.L.R. 110.

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⁵ 97 L.T. 292.³ [1912] 1 Ch. 667; 28 T.L.R. 283.

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—

by the School Sites Act of 1841, and the fact that the reverter was not discussed seems to me immaterial. In the present case care is taken not to deal with the reverter, because one does not want to have anything to do with the successors of the Lords of the Manor. The whole basis of the proceedings is that the trustees have got a title, even though the right of reverter has arisen, by virtue of the possession which they have had.

In the same way, *Attorney-General v. Price*⁶ avoided the question of the reverter, though there was some argument as to whether one particular scheme might not prevent the right of reverter operating; but Lord Cozens-Hardy M.R., who considered the question, said⁷: "In the fourth place, whatever may be the rights of some person not before the court under the reverter clause in the Act (as to which it would be wrong for me to express any opinion), the trustees so long as they are in possession under the deed are bound by the trusts declared in the deed as varied by any scheme made by the court." It seems to me that the power of the court to make a scheme for the *cy-près* application of the property in question, which was what was done in *Attorney-General v. Price*,⁸ must depend upon the continuance of the trusts as binding on the trustees unless and until varied by law, because if the charitable trusts immediately came to an end on the operation of the reverter, there would be (as, indeed, it was argued by Mr. Wigglesworth for his own purposes) a complete determination of the trust, so that there would be no power to direct any *cy-près* application. On the footing that the court had power to direct a *cy-près* application, it must be inferred that the trusts would continue after the closing of the school; that is, after the possible right of reverter had arisen. Consequently, I find it impossible to come to any other conclusion than that the closing of the school and the arising of the right of reverter to the estates of the grantors does not bring to an end the trusts which were created by the deed of grant. If that be so, then the trustees, the vicar and churchwardens and their successors who are named in the deed of grant, must remain trustees upon those trusts; and, if they remain trustees upon those trusts, it is not open to them to deny the trusts and to claim either that they hold the property for their own beneficial purposes or that they hold it upon some trusts other than those which were operative under the deed of grant. It is therefore quite plain that after the closing of the school in

⁶ [1912] 1 Ch. 667.

⁸ [1912] 1 Ch. 667.

⁷ *Ibid.* 678.

the present case the vicar and churchwardens for the time being remained trustees on the trusts to maintain a school, and that they could not hold the property on any other trusts unless and until either the court or the Board or Minister of Education had settled some scheme for a *cy-près* application.

I will declare that on the true construction of the grant and the School Sites Acts, and in the events which have happened, the freehold property was, immediately before the conveyance or purported conveyance thereof on sale in the year 1952 to the Parkland Manufacturing Co. Ltd., held by the plaintiffs on trust to apply the same for the purposes of education so as to constitute the said property as an educational endowment within the meaning given to that expression by section 5 of the Endowed Schools Act, 1869.

That means that the conveyance to the purchaser is void, but the charity cannot have both the land and the money, and I suppose there will have to be a confirmatory conveyance, or something of that sort; because, otherwise, any purchaser from the company might take an objection.

Declaration accordingly.

Solicitors: *Ward, Bowie & Co. for Booth, Wade, Lomas-Walker & Co., Leeds; Treasury Solicitor.*

I. G. R. M.

In re EGERTON'S WILL TRUSTS.

LLOYDS BANK LTD. *v.* EGERTON AND ANOTHER.

[1954 E. No. 1857.]

Conflict of Laws—Marriage—Property—Matrimonial domicile—Change of domicile contemplated on marriage — Law governing widow's rights to husband's property.

In 1932 the testator, domiciled in England, married a Frenchwoman domiciled in France. After his marriage he retired from active service with the British army and went to live in France with his wife. They did not actually settle there until 1934, but the testator remained in France, with the exception of his residence in England during the war, until his death in 1951, when he had admittedly acquired a French domicile. His widow claimed that the testator's estate should be administered in community of property

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according to the law of France on the ground that the evidence showed an intention on the part of the testator and his wife to live permanently in France immediately after their marriage, which they carried out and thus justified an inference that they intended the law of France to apply to all their personal property as from the time of their marriage.

The widow's evidence was: "Neither before nor at the time of "my marriage . . . nor at any time afterwards, was there any "discussion or express agreement between us as to community or "separation of property. It was, however, agreed between us "before marriage that as soon as possible we would settle in "France and establish our permanent and only home there. We "carried this intention into effect":—

Held, (1) that there was a presumption that the law of the husband's domicile (in this case English) applied to the rights of husband and wife to each other's movables, which presumption could be rebutted by an express contract, or a tacit contract if the circumstances warranted the inference of such a contract.

(2) That, on the facts, no such inference could be drawn from the conduct of the parties as to justify an inference by the court that they had entered into a tacit contract that the law of France was to apply to their mutual property rights.

In re Martin [1900] P. 211; 16 T.L.R. 354 considered.

Statements in Dicey's *Conflict of Laws* (6th ed., pp. 795, 541 and 542) and Cheshire's *Private International Law* (4th ed., pp. 491, 492 and 493) discussed.

ADJOURNED SUMMONS.

On May 6, 1932, the testator, Charles Hertel Egerton, married the first defendant, Alice Marie Germaine Egerton, as his second wife. She was at that time domiciled in France and a French-woman. She survived him and he made provision for her in his will, which she regarded as unsatisfactory.

The father of the testator was born at Bunbury, Cheshire, on February 7, 1834, and he had an English domicile of origin. There was no evidence of his ever being in France before the year 1882, though he had previously travelled. On April 10, 1883, the testator's father was married in France, and on September 22, 1884, the testator was born at Fécamp in France. His birth was registered at the British Consulate. Although the testator, many years afterwards, in 1937 and in 1938, alleged that he had been born in Kent, his Lordship found that that statement was untrue.

The testator lived at various places in France with his parents till 1891, when they brought him to England. He was educated at a school in Bedford; after which he went to the Royal Military Academy at Woolwich. From 1891 until 1903 the testator's

parents lived in England in furnished accommodation. In 1903, when the testator was 19, his parents returned to France and lived at the Château de St. Antoine, which the testator's mother had inherited, the testator's father having some kind of business in France.

On January 19, 1904, the testator received a commission in the Royal Engineers, and served chiefly at foreign stations. In 1912 his parents gave up the château and came to England and set up a home at Great Bedwyn in Wiltshire. In 1913 his father died at Great Bedwyn. On December 14, 1925, the testator married his first wife at the Garrison Chapel, Rangoon. On April 2, 1930, while the testator was on service in India, his first wife died at Great Bedwyn, at The Croft, her mother-in-law's home. On July 15, 1930, the will of the testator's first wife was proved. In that will she had given her address as Bulford Camp, Salisbury, and in the act of probate she was described as being of "The Croft, Great Bedwyn"; there was no suggestion anywhere that she had a French domicile. On February 29, 1932, the testator sailed for England from India. On April 16, 1932, he arrived in England to go on leave. Shortly afterwards, on May 6, 1932, he married the first defendant at the Paddington District Register Office.

On August 27, 1932, the testator asked to be placed on retired pay "owing to reasons of health and private affairs." On September 18, 1932, his leave expired and he was then granted sick leave until June 20, 1933. Some time in 1932, but later than September 19, he went to France on sick leave pending his retirement. On July 19, 1933, he wrote from The Croft, Great Bedwyn, to the War Office asking for leave to retire from December 21, 1933, and said that on medical grounds he would take up his future residence abroad, probably in the South of France. In August, 1933, he gave a power of attorney to a certain bank to receive his pay from the War Office. On September 17, 1934, he wrote a letter on a business matter to the manager of the trustee department of Barclays Bank Ltd. in which he said: "I will probably be settling shortly in the South of France for reasons of health." His Lordship held that he did not actually settle in France until after that date, and that his earlier visits to France were of a more tentative character.

Having settled in France, the testator in due course built a house for himself called the "Villa Emenda." The testator had to acquire land for the purpose of building the house, and he entered into three separate transactions in the purchase of

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that land. In one of the transactions appeared the statement that the testator was born in Kent, which was not true, and his Lordship was unable to believe that the testator thought that it was true. It was said that the purchase was effected as between the vendor and the first defendant, "acting with " assistance and permission of her husband." There were three documents of different date, but of substantially the same effect. The document of July 9, 1937, was (according to the translation) as follows: "Sale. Mr. and Mrs. Delgue and Mrs. " Larroquere, widow, the appearers hereby sell by binding them- " selves jointly and severally amongst them to the widest ordinary " factual and legal guarantees, to Mrs. Alice Marie Germaine " Hertel, wife of Mr. Charles Hertel Egerton aforementioned 'Here " " present and who accepts, together with the assistance and " " permission of Mr. Egerton her husband. Mr. and Mrs. Egerton " " married at Paddington district of London on May 6, 1932, " " declare to be subject to the English régime and to make the " " present purchase in the name and for the personal account " " of Mrs. Egerton born Hertel, so that it may remain the " " separate property of the said dame Egerton in application of " " the régime and English law.' "

On one or other of the sites comprised in these three documents, which were dated February 7, 1937, July 9, 1937, and December 20, 1938, the testator built the "Villa Emenda."

His Lordship found that by this time the testator had undoubtedly acquired a French domicile. He and the first defendant lived in France until shortly before September 1, 1939.

About September 1, 1939, the testator was called up as an officer on the reserve list, but on October 9, 1939, he was permitted to retire on account of ill-health. He returned to France, but came back to England later. On May 3, 1946, he left England, and went back to the "Villa Emenda," which he found intact.

The testator's mother died in 1948 in England, but the testator did not go to her funeral, or to England at all on that occasion.

On October 16, 1951, he died at the "Villa Emenda" leaving a will dated July 19, 1946.

Lloyds Bank Ltd., as executors of the testator's will, took out the present summons asking the court to determine whether his estate should be administered on the footing that the régime of community of property as provided by the law of the Republic of France, with his widow, the first defendant, applied thereto.

Raymond Walton for Lloyds Bank Ltd., executors.

R. O. Wilberforce Q.C. and *E. I. Goulding* for the first defendant, the testator's widow. The first submission is that on the facts the testator's father had acquired a French domicile of choice by the time of the testator's birth; the testator had, therefore, a French domicile of origin. The evidence does not establish that he ever lost that domicile of origin, and accordingly he had a French domicile at the date of his marriage to the first defendant.

The alternative submission in law is that where a person at the date of his marriage intends to acquire a French domicile after his marriage, and puts that intention into effect, that would operate to attribute the law of the intended domicile to him, so that the doctrine of community of property—which exists under French law—would obtain as from the date of the marriage.

The first question is under what system of law did these parties intend to live? The evidence is that they intended to live in France as soon as they could; that must mean that they intended to acquire a French domicile. The general rule is that parties intend their relationships in regard to their movable property to be governed by the law of the husband's domicile at the date of the marriage; but the parties may be deemed to intend their marriage to be governed by the law of the place where they show an intention of going to live after the marriage; that law will in those circumstances replace the law of the husband's domicile in relation to their movable property. This proposition is not laid down in any reported case, but some support for it is to be found in the textbooks: see Dicey's *Conflict of Laws*, 6th ed., pp. 541–542, and Cheshire's *Private International Law*, 4th ed., pp. 491, 493. This case, it is submitted, would fall within the exception laid down by Cheshire (at p. 493), who said that there was a strong presumption that the *lex domicilii* of the husband at the time of the marriage governed the mutual property rights of the spouses, but that that presumption was rebutted if it were proved that they intended before marriage to establish their home in some other country and had in fact carried out this intention. In such a case the law of the new country attaches on marriage, or at any rate as soon as the parties go to their new home—in this case, France. In *Lashley v. Hog*¹ change of domicile from English to Scottish was held by the House of Lords to carry with it the application of Scottish law to the property relations of husband and wife: see also Dicey (at p. 796).

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¹ (1804) 4 Pat. 581.

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On the documents of this case, and in all the circumstances, it should be inferred that the parties intended French law to operate on their property when they married.

Alternatively, this case would fall within the proposition of Dicey (at p. 796) that where there is no marriage contract or settlement and there is a subsequent change of domicile the rights of the husband and wife to each other's movables, both *inter vivos* and in respect of succession, are governed by the law of the new domicile, except in so far as vested rights had been acquired under the law of the former domicile: see also *In re Martin*.²

It must be conceded that the parties here did not go to France the day following their marriage, but they went in a year or so; that was as soon as they could go. The evidence is that it was their intention before marriage to go and make their home in France; that is relevant evidence of an intention to acquire a French domicile as soon as they could. Only evidence before marriage is relevant to this question of intention. They intended, therefore, French law to operate from the time they established their domicile in France, and that would have the effect of making French law apply to their movable property as from the time of their marriage. There was, moreover, no permanent home in England from which they had to be uprooted. Although this is not a case of immediate transfer after marriage, or even very shortly after, the period between their marriage and going to France is relatively short when the marriage is looked at as a whole.

E. J. A. Freeman for the second defendant, one of the next-of-kin, was only asked to argue the second submission. *Prima facie*, the property rights of spouses are dominated by the law of the husband's domicile at the date of the marriage; but it is also clear that they can agree that other law should operate in respect of them. Where there is a marriage settlement it can be an express or implied term of the settlement. In view of *In re Martin*³ such an agreement can also be implied by conduct, even in the absence of a settlement. But the *prima facie* rule can only be displaced if there is clear intention to that effect on the part of the parties. The question, therefore, is what was the intention of the parties at the time of the marriage, i.e., does the court infer on the facts as a whole that the parties intended their property rights to be other than those of the husband's domicile?

² [1900] P. 211; 16 T.L.R. 354.³ [1900] P. 211.

The proposition is accepted that the law of their rights as to property should be that of the husband's domicile.

It is possible for parties to agree before marriage that their property rights should be governed by law other than that of the husband's present domicile, and it may be that such an agreement can be implied, but it can only be implied on the evidence as a whole. It is not really a question of domicile, since the parties might not want to acquire French domicile, but merely want to submit to the property law of France. Although it can be inferred that parties intended the law of the new country to dominate their property, it must be clear that that is so, and merely saying, as in this case, that they were going to live in France is not such evidence. The court from that evidence can infer no more than an agreement between the testator and the first defendant to go and live abroad. No inference can be drawn on this evidence to displace the normal presumption. The date of any such agreement must be before the marriage, and the court must consider the conduct of the parties as a whole and what happened after the marriage. The spouses here married in this country and remained here some time after their marriage; it cannot be suggested on the mere evidence of an intention to live abroad that they intended their property rights to be regulated by foreign law as from the date of their marriage but while still in this country. The *prima facie* rule is not displaced, and the law of the husband's domicile at the date of his marriage must apply.

ROXBURGH J., having stated the facts, continued: The first question which I have to determine is not what was his domicile at the date of his death but what was his domicile at the date of his marriage on May 6, 1932. I can find absolutely nothing in his record up to that date which would suggest that he had any domicile other than English. Faced with that problem, Mr. Wilberforce developed before me what was indeed a most ingenious argument, except that I think that the first part fails. He submitted that the testator's father was a domiciled Frenchman. His domicile of origin was, therefore, French, and there was nothing to show that he had elected to acquire an English domicile, because in truth and in fact he had been here, there, and everywhere from the time of his birth until the date of his second marriage in 1932. I think that if the premise had been well founded, that argument, though I hardly feel that it savours much of reality, would have been

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difficult to displace. But I think the premise is ill founded. The testator's father was born in that most English county of Cheshire as long ago as 1834. His domicile of origin was English, and there is, in my judgment, no evidence whatever that he had abandoned his domicile of origin in favour of a domicile of choice in France by the time the testator was born in the year 1884. There is no evidence of his ever having been in France before 1882. I have no account whatever of his previous life, which had already endured from 1834. All I can say is that I am not prepared to find that the testator's father ever had a domicile of choice in France, and, accordingly, that ingenious superstructure collapses.

But that is by no means the end of the case, because Mr. Wilberforce has propounded an argument which might almost be said to set the professors by the ears. To start on a safe foundation, I will first read rule 171 in Dicey's Conflict of Laws, 6th ed., p. 795, which says: "Where there is no marriage contract or settlement, and where no subsequent change of domicile on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicile, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage." That is indisputable law. So that, *prima facie*, the law applicable in the present case, on the finding of fact which I have just made, is English law. I have deliberately used the phrase "*prima facie*." I can disregard the words of the rule "where no subsequent change of domicile on the part of the parties to the marriage has taken place." In truth there was a subsequent change in the domicile in the present case. But I need not pursue that question further because, for reasons connected with French law, which I need not elaborate but which Mr. Wilberforce found quite compelling, he did not base any argument on the subsequent change of domicile.

What Mr. Wilberforce did was to explore the problem which has been the subject of debate between Dr. Morris, the author of the note that I am going to read, and Dr. Cheshire. The particular note refers to a somewhat different position, namely, where there is a marriage contract, but for the present purpose that is not important because it is really a discussion of the phrase "*matrimonial domicile*." The passage in the text of

Dicey (at p. 541) is as follows: "The marriage contract, or settlement, will be construed with reference to the proper law of the contract, i.e., in the absence of reason to the contrary, by the law of the husband's actual domicile at the time of the marriage. The husband's actual domicile at the time of the marriage is hereinafter termed the 'matrimonial domicile.'" I have read that passage in order to explain the note, because it is the note and not the passage which really raises the issue. Dr. Morris says this (at p. 542): "Whether in this Exception and in the rest of this Digest the term 'matrimonial domicile' ought to be extended, so as to mean the intended domicile of the husband, when, as occasionally happens, he, though domiciled in one country, intends, to the knowledge of both parties to the marriage, to become immediately domiciled in another country (e.g., France),"—and I stress at once the word "immediately"—"is a question on which there is no decisive English authority. On the theory, however, of a tacit or express contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of that term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage"—and I again stress that word—"seems to some authorities reasonable. For instance, if H, domiciled in England, marries in England W, domiciled in South Africa, and H and W sail to South Africa immediately after the ceremony"—and again I stress the word "immediately"—"intending to make it their permanent home, it would seem reasonable at first sight to hold that South Africa, and not England, was their matrimonial domicile. The difficulty is, however, that there is no conclusive English authority in favour of this view, and there are practical difficulties in its application. What if H and W do not sail to South Africa until a month—or a year—after the ceremony? Where is the line to be drawn? Are the rights of the spouses to be in suspense until they actually acquire a new domicile in pursuance of their pre-matrimonial intention? It is submitted that the safer rule to adopt is that the matrimonial domicile means the husband's domicile at the time of the marriage. In a clear case where the parties change their domicile very shortly after the marriage"—and I do again stress the words "in a clear case"—"in pursuance of a pre-matrimonial intention to that effect, the change of domicile might well be a 'reason to the contrary' within the meaning of the exception.

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" This way of looking at the matter has the advantage of avoiding
" the use of a term of ambiguous meaning which suggests either
" that a change of domicile can be effected by mere intention, or
" that ' matrimonial domicile ' means something different from
" ' domicile ' simpliciter."

Different, however, is the approach of Dr. Cheshire in Private International Law. The passage is too long for me to read in extenso, and I am only going to read extracts. It begins with these words (4th ed., at p. 491): " Although there is no clear-cut and decisive authority, the prevalent view is that the determining domicil is that which the husband possesses at the time of the marriage. On the whole it is an unobjectionable view, for in the vast majority of cases the parties retain the husband's domicil immediately after the marriage. Nevertheless, a rule better calculated to function more justly and more conveniently in every case is one which selects the country of the intended matrimonial home. This is equivalent in the normal case to the domicil at the time of the marriage, but its merit is that it meets the not unusual case where the parties intend to settle immediately after marriage in another country." After leaving something out, I read again (at p. 492): " It is respectfully submitted, however, that the just and reasonable view to take"—on the facts, which he had just mentioned—" is that the law of the country in which the parties intended to settle immediately, in which in fact they did settle, and in which so far as they could foresee they would remain for the rest of their married lives, should be allowed to govern their mutual proprietary rights. The reasonable inference from the circumstances is that they intended to submit themselves in toto to the matrimonial régime, proprietary as well as personal, obtaining in their future home." Then he says (on p. 493): " The view that the matter should be governed by the law of the intended matrimonial home lacks neither doctrinal analogy nor juristic support." Then he says later: " It is undeniable, of course, that the practical application of the doctrine of the intended matrimonial home may in some cases encounter considerable difficulties. . . . How quickly must the intention to settle in the specified country be implemented? What if there is unforeseen delay or some accident which frustrates the design? Will effect be given to the alleged intention if it remains a secret locked in the breasts of the parties? These difficulties are no more insuperable than those which often attend the ascertainment of intention in a disputed case of

“domicil. Everything hinges on intention, but the dominion of
 “the *lex domicilii* of the husband at the time of the marriage
 “is not displaced unless the intention to acquire a new home is
 “established by irrefragable evidence. In fact, the suggested
 “rule goes no further than this: There is a strong presumption
 “that the *lex domicilii* of the husband at the time of the
 “marriage governs the mutual proprietary rights of the spouses.
 “This presumption is rebutted if it is proved that they intended
 “before the marriage to establish their home in some country
 “other than the husband’s domicil and that they have in fact
 “carried this intention out. The presumption may be rebutted,
 “though not lightly, if the question falls to be considered before
 “the intention has been carried out.” If that suggested rule
 is in fact a rule of English law, then I think there is no doubt
 that Mr. Wilberforce’s client would succeed in the present case,
 because the first defendant has deposed to the following state-
 ment in an affidavit, she has not been cross-examined on it, and
 it is a statement which I accept. She says this: “Neither
 “before nor at the time of my marriage to the testator, nor at
 “any time afterwards, was there any discussion or express
 “agreement between us as to community or separation of
 “property. It was however agreed between us before marriage
 “that as soon as possible we would settle in France and establish
 “our permanent and only home there. We carried this intention
 “into effect, and neither of us ever had a permanent home
 “outside France after the date of our marriage.”

I have, therefore, to approach this controversy between Dr.
 Morris and Dr. Cheshire with that caution and respect which
 they both deserve. I think a good starting point is a passage
 in the judgment of Vaughan Williams L.J. in the Court of
 Appeal in *In re Martin*,¹ where he says this²: “In my opinion,
 “the effect of the husband’s domicile on the matrimonial
 “property is based on the presumption that you must read the
 “law of the husband’s domicile into the marriage contract as a
 “term of it, unless there is an express agreement to the
 “contrary.” I must respectfully differ from those last words
 “unless there is an express agreement to the contrary,” because
 I see no reason why, if the facts warrant it, an agreement which
 is sometimes erroneously called “a tacit agreement” might not be
 as effective as an express agreement. What I am referring to is
 concisely described in Anson’s Law of Contracts (15th ed., p. 22),
 which says: “The description which I have given of the possible

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¹ [1900] P. 211; 16 T.L.R. 354.² [1900] P. 211, 240.

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“forms of offer and acceptance shows that conduct may take the place of written or spoken words, in offer, in acceptance, or in both. A contract so made is sometimes called a tacit contract; the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.” For my part, I see no reason why an appropriate agreement excluding the presumption could not be inferred from the conduct of the parties if the circumstances of the case justify such an inference, and it is, I think, something of that kind which Dicey must have contemplated when he used the somewhat wide phrase “in the absence of reason to the contrary.”

There is one point which I must consider which I do not remember meeting before, and on which no authority has been cited to me, and which is very material in this case. Mr. Wilberforce has submitted that in deciding whether or not an agreement is to be inferred from conduct, the only conduct which can be considered is conduct earlier than or contemporaneous with the date on which the alleged contract was made. I see no reason for such a limitation, which I should have thought would put the court into blinkers and preclude it from doing palpable justice in some cases. I will give an example, though perhaps a fanciful one. Supposing that it might be relevant to determine whether there was to be inferred from the conduct of two parties an intention to make a voyage to South Africa, and supposing that the evidence before the date of the journey was that they had consulted tourist offices, obtained particulars of fares, possibly even booked some accommodation, had written to friends and said that they were coming, and supposing that it was quite uncertain at that date whether there was any reason to go to South Africa other than what was to be inferred. Then when the departure comes, they go to New Zealand. It would be ridiculous to exclude from the circumstances from which the inference had to be drawn the circumstance that in the end, at any rate, they went to New Zealand. That is perhaps an extreme case. But I certainly take the view that if it is a question of inferring something from conduct, the court must look at the conduct as a whole and not stop its investigation at any particular date. That approach, as I think, gets rid of all the difficulties.

I would, first of all, like to consider—though it is obiter in this case—the case where the parties agreed before the marriage to change their domicile immediately. I can well conceive that in certain circumstances that mere fact might be enough to lead

the court to infer that the parties intended their proprietary rights to be regulated by the law of the new domicile from the moment of their marriage. Take, for example, the case of two comparatively poor persons, one, the woman, having a few National Savings Certificates, and the man being a weekly wage earner. They both decide to emigrate to Australia. I can well believe that the court might think that that was enough in those circumstances to lead to the inference that they intended their proprietary rights (which at that stage were nugatory, but which might thereafter become of great value), to be regulated from the beginning of their married life by the law of Australia. I can well believe that the court might in those circumstances draw some such inference. However, take the case of an elderly widower who was a director of half a dozen companies in England and held shares and debentures and exchequer bonds and various things in England. He marries a young wife, and being ill and in need of a warm climate, agrees to leave immediately to take up his home in South Africa. I cannot imagine that any court would ever draw the inference from the mere fact that they had decided immediately to leave for South Africa to make it their permanent home, and did so, that he intended that all his proprietary rights should, as from the date of their marriage, be governed by the law of South Africa. I have only given those illustrations to show that what inference the court might or might not draw from the circumstances of an immediate change of domicile would depend on all the circumstances of the case. There does not seem to me to be any particular difficulty. Indeed, I think that I am, roughly speaking, adopting the solution which Dr. Morris has suggested, though in place of the somewhat vague phrase "reason to the contrary" I should prefer to put it that an inference was to be drawn from all the circumstances of the case that the law of the new domicile was intended to apply as from the date of the marriage.

But I am not really concerned with that case, because the evidence of the first defendant is "We would settle in France "as soon as possible." That very phrase, in my view, connotes that circumstances might not make it possible to settle there immediately, and indeed there were circumstances which did stand in the way of an immediate departure. There were certain circumstances connected with the testator's release from the army, and there may have been—though there is no evidence of that—financial and business reasons. The evidence is singularly meagre in this case. I think that the difficulties of inferring

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anything of that sort are very much greater because, if it is once conceded that the parties contemplated that a period of time is to elapse before they change their domicile, it is most improbable that they intend the new law, or rather, the law of the new domicile, to apply before they actually change their domicile. If, therefore, any inference of this nature is to be drawn, a dichotomy of property rights appears to result, so that they would have some property subject to the law of the matrimonial domicile, that is to say, the husband's domicile at the time of the marriage, and some property subject to the law of the State in which they had a newly acquired domicile. Such an agreement could be made—I see no juristic difficulty—but it seems to me to be an improbable arrangement and, therefore, strong evidence would be required to justify any such inference merely from conduct and without any express agreement, written or oral.

In the present case there is no evidence of any intention to substitute the new law, that is to say, the law of the changed domicile, for the law of England. All the matters on which Mr. Wilberforce relies are equivocal and could not possibly be said to be evidence which would justify any such inference. I have deliberately said that, because, even if I am wrong in thinking that I am entitled to have regard to the declarations in the three documents to which I have referred, I should still hold that there was not enough evidence to justify the inference which Mr. Wilberforce asks me to make. But if, as I think, I am entitled to look at those documents, then there is strong evidence that no agreement between these parties is to be inferred from their conduct that the law of France was to apply as soon as they took up their residence in France. I myself should have thought that if any kind of change of that sort was in contemplation the testator would, at some stage, have been bound to have discussed it with the first defendant, and her evidence is that he never did. In my opinion, in the circumstances of this case, it would be quite fantastic to infer from what is merely the change of domicile that it was arranged at the time of the marriage, tacitly or by conduct, that French law should apply to their property rights as soon as they settled in France, and I decline to draw any such inference.

If that be the right basis in law, that is, of course, the end of the matter. If, however, Professor Cheshire's view is to be adopted, then I think that Mr. Wilberforce would succeed, but I can find no foundation in the authorities for Professor

Cheshire's view. In my judgment, it is reasonably plain that there is a presumption that the law of the husband's domicile applies to a marriage, and that the presumption can be rebutted. It can certainly be rebutted by express contract, and, in my judgment, it could also be rebutted by what is loosely called a tacit contract, if the circumstances warrant the inference of such a tacit contract. Therefore, in substance, I adhere to the view expressed by Dr. Morris. The widow, the first defendant, is not entitled to have the estate administered under the régime of community of property in accordance with French law.

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Declaration accordingly.

Solicitors: *Bell, Brodrick & Gray; Janson, Cobb, Pearson & Co.; Thompson, Quarrell & Megaw for Bond, Pearce, Elliott & Knape, Tavistock.*

I. G. R. M.

CITY OF LONDON REAL PROPERTY CO. LTD. v. WAR
DAMAGE COMMISSION.

1956
July 18,
19, 24.

[1955 C. 5244.]

Vaisey J.

War Damage—Cost of works payment—“Making good” damage—Such payments determined in respect of damage on 10 sites—Redevelopment of sites by construction of two large new buildings—Whether such redevelopment “making good” the damage—War Damage Act, 1943 (6 & 7 Geo. 6, c. 21), s. 8 (2) (3).

Ten small properties belonging to the appellant company suffered war damage, in respect of which the War Damage Commission determined that a cost of works payment was appropriate. The company redeveloped the sites of the premises by constructing thereon two large new buildings. The commission withheld the cost of works payments on the ground that the redevelopment was of so substantial a nature that it could not be described as making good the damage by works which included alterations or additions to the hereditament, as required by section 8 (3) of the War Damage Act, 1943,¹ to qualify for a cost of works payment.

¹ War Damage Act, 1943, s. 8:
“(2) If the war damage is made good
“by reinstating the hereditament in
“the form in which it existed immediately before the occurrence of the
“damage, the amount of the payment
“shall be an amount equal to the
“proper cost of the works executed
“for the making good thereof. . . . (3)

“If the war damage is made good by
“works which include alterations or
“additions to the hereditament, the
“amount of the payment shall be an
“amount equal to so much of the
“proper cost of the works executed
“for the making good of the damage
“as falls within the permissible
“amount.”

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On the hearing of a number of motions brought by way of appeal from the commission's determination:—

Held, (1) that the test to be applied was represented by the opening sentences of paragraph 4 of Note 1 of the Second Series of the War Damage Commission's Practice Notes (July, 1945), in the words: "The test which the commission will apply in order to "decide whether works . . . constitute making good the war "damage or involve the creation of a different property . . . is: " "Looking at the works executed, can the property be fairly " "described as still the same property as before the war damage, " "though altered or added to?" And it is to be answered on "common sense lines."

(2) That, applying that test, the new buildings, in so far as they stood on the site of any one of the 10 buildings which had suffered war damage, were not the same property as before the war damage, but a wholly different property, and that the former property had been "altered or added to," not only out of all recognition but out of existence.

ORIGINATING MOTIONS.

On May 10, 1941, 10 properties, known respectively as 28 Fenchurch Street, 24, 25, 26 and 27 Rood Lane, 127 Fenchurch Street, 134 and 135 Fenchurch Street, and 3 and 4 Cullum Street, and situate in the City of London, suffered damage, in respect of which the War Damage Commission determined that a payment of cost of works was appropriate. Acting on that determination the City of London Real Property Co. Ltd. (hereinafter called "the appellants") expended and were at the date of the hearing of these motions expending considerable sums on the erection of two new buildings which together covered the sites of the 10 properties. In a letter dated July 1, 1955, and written on behalf of the commission, it was stated, *inter alia*, that the commission could only conclude that each of the 10 properties would have become (i.e., as a result of the proposed redevelopment) an indistinguishable part of an entirely different property; and, on October 17, 1955, the commission, using the exact words of most of the rest of the letter of July 1, determined that "a comparison of the plans of the original "properties and of the proposed redevelopment shows so little "correspondence between the old and the new that the com- "mission find it impossible to say of any of the original properties, "including [giving the appropriate description of the property in "each one of the five determinations], that the damage will have "been made good by works which include alterations or additions "to the hereditament."

By these motions the appellants claimed the determinations to be wrong in law because (1) section 7 of the War Damage Act, 1943, required the commission to make a payment of cost of works; (2) the commission had in fact determined to make that payment and communicated that determination to the appellants in 1948; (3) section 8 of the Act (referring to "making good" war damage by works which included alterations or additions) was relevant to the quantum but not to the kind of payment; (4) the commission's functions relating to the making of payments were required by section 20 of the Act to be executed in conformity with the public interest as respected (inter alia) town and country planning; (5) the Act contained no provisions limiting the extent of the alterations or additions which might be included in the works of making good war damage; and (6) the commission, in the events which had happened and having regard to the extent to which the appellants had acted on the commission's first determination, were estopped from varying that determination; and the appellants claimed, pursuant to section 32 of the Act, an order discharging the commission's determination of October 17, 1955, and a declaration that the appellants were entitled to receive from the commission in respect of the war damage to [giving the appropriate description of the property in each one of the five originating notices of motion] a payment of cost of works of an amount calculated in accordance with the provisions of the Act.

Harold Williams Q.C. and *J. Ramsay Willis Q.C.* for the appellants. The commission's original determination that a cost of works payment was appropriate should stand. There is not in the Act any provision limiting the extent of alterations or additions which can be included in the work of making good war damage. It was on the strength of the commission's original determination that the appellants began and continued the work which they are now doing, and the commission should not now be allowed to vary that determination just because they take the view that that work amounts to far more than "making good," or, as they put it, that each of the original properties "will have become an "indistinguishable part of an entirely different property." They are estopped from varying their determination: *In re 56 Denton Road, Twickenham*²; *Associated London Properties Ltd. v. War Damage Commission*³; *Lyle-Meller v. A. Lewis & Co.*

² [1953] Ch. 51; [1952] 2 T.L.R. 676; [1952] 2 All E.R. 799.

³ Unreported.

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(*Westminster*) Ltd.⁴; *Central London Property Trust Ltd. v. High Trees House Ltd.*⁵

Even if section 8 (3) imposes any restriction at all on what is "alteration" or "addition," it refers to the quantum of payment, not the kind. The ultimate test is whether the commission are correct in saying that they are satisfied that the damage will be made good. Merely to say that they are "satisfied" is not sufficient. They must, in being "satisfied," apply a correct view of the law, i.e., of the true and proper meaning of the Act. Certainly, in ordinary walks of life the words "making good" are used in the sense of precise reinstatement, as, e.g., in schedules of dilapidations; but the present case is not one in which the war damage could be made good in that literal sense.

Michael Rowe Q.C. and *Denys Buckley* for the commission. There cannot be any estoppel in the present case as there was in *In re 56 Denton Road, Twickenham*.⁶ The commission could not discover any earlier than they did that the work being carried out did not constitute making good the damage. The question is one of mixed law and fact: see the observations of Denning L.J. in *Cardiff Rating Authority and Cardiff Assessment Committee v. Guest Keen Baldwin's Iron and Steel Co. Ltd.*,⁷ where he said: "The truth is that in these cases the tribunal of fact can approach their task from several possible bases. The basis which they take for one part of the hereditament may be different from that for another. They may work out figures on two different bases and arrive at an assessment in between the two. The selection of the basis or bases, and the application of them singly or in continuation, are only methods of arriving at the final figure of assessment. The parties can urge before quarter sessions all their arguments on this basis or that, but once quarter sessions have fixed the figure that as a rule is final. An appellate court will not interfere unless the method is demonstrably incorrect, or the figure is so obviously wrong that it must have been reached by an incorrect method: see *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*."⁸ It is erroneous to use the expression "making good" to describe something which is not in itself a continuity of something. The two buildings which are now being erected are not a continuity of those which suffered war damage. The

⁴ [1956] 1 W.L.R. 29.

⁵ [1947] K.B. 130; 62 T.L.R. 559.

⁶ [1953] Ch. 51.

⁷ [1949] 1 K.B. 385, 395; 65

T.L.R. 159, 160; [1949] 1 All E.R. 27, 29, 30.

⁸ [1901] A.C. 175, 180.

most useful guide on questions of alterations and additions is provided by the commission's Practice Notes, of which the relevant one in the present case is Note 1 of the Second Series (July, 1945). Paragraph 4 of that note opens with the words: "The test which the commission will apply in order to decide whether works . . . constitute making good the war damage or involve the creation of a different property . . . is: 'Looking at the works executed, can the property be fairly described as still the same property as before the war damage, though altered or added to?' And 'it is to be answered on common sense lines.'" In the present case what the court has to deal with consists of several separate sites, not the composite site which constitutes the site of the two new buildings. That is of the greatest importance in considering whether there has been a loss of identity. True, in the correspondence about the matter, there was a reference to road widening, but from start to finish there was no reference to any other kind of planning. This particular development on which the appellants have finally decided is not the only one which they could have carried out, although it may be the best from their point of view and, indeed, from the point of view of the best town planning in the public interest. If they choose to do something which is not "making good," that does not concern the commission, whose sole duty is to administer the Act. The present case is one in which a reasonable person could say that there has been loss of identity; and the final determination of the commission is correct.

Harold Williams Q.C. in reply. It is questionable whether there is no continuity and no identity. It is quite clear, for example, that there will be two new buildings and that a firm of jewellers will continue to occupy a shop on the same site. It is inconceivable that the matter of identity is relevant to the question before the court, which is not whether the building is being made good but whether the damage is being made good.

1956. July 24. VAISEY J. read the following judgment: In each of the five cases now before me for judgment the appellants are the City of London Real Property Co. Ltd. In each case the appeal is against a "determination" of the respondents, the War Damage Commission, and the point involved in all the cases is the same. It is perhaps surprising that it has not come before the court hitherto.

The properties with which the appeals are concerned are situated in a very congested part of the City of London, in, and

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in the neighbourhood of, Fenchurch Street. Before the occurrence of the war damage giving rise to the present appeals the hereditaments were in each case comparatively small units of building comprising basements and ground and upper floors, and the area of the sites occupied was in each case of quite small dimensions. There is no dispute about the facts, and what the War Damage Commission have "determined" is that the incorporation of these sites, with others, into the site of a large building in a process of redevelopment such as is being widely adopted at the present time in the City of London and other comparable areas of property, cannot be treated as a making good of the war damage to the original hereditaments within the meaning of the War Damage Act, 1943. In other words, they say that the projected large new buildings (there are two of them) covering and absorbing, so to speak, the sites of the respective hereditaments to which the appeals relate, are new hereditaments and not the pre-existing hereditaments any longer.

It seems to me that the question in each case is one of mixed law and fact. The true construction of the relevant provisions of the War Damage Act, 1943, comes first, and involves a question of law, and when that has been ascertained the question whether those provisions have been rightly applied to the circumstances of the particular cases is, to my mind, a question of fact.

The point really lies within a very narrow compass. In the first place, these are admittedly *prima facie* cases for the payment of cost of works and not of a value payment. Turning to section 8 of the Act, subsection (2) provides: "If the war damage "is made good by reinstating the hereditament in the form in "which it existed immediately before the occurrence of the "damage, the amount of the payment shall be an amount equal "to the proper cost of the works executed for the making good "thereof." That is subsection (2), and no one suggests that what is being done in these cases is a "reinstatement" of the hereditaments in their pre-existing form, and, therefore, I now turn to subsection (3) of the section which provides as follows: "If the war damage is made good by works which include altera- "tions or additions to the hereditament, the amount of the "payment shall be an amount equal to so much of the proper "cost of the works executed for the making good of the damage "as falls within the permissible amount."

I need not pause to explain what is meant by "proper cost" or "permissible amount," for the only point is whether what is now proposed to be done can properly be described as "making

“good” the war damage to each hereditament by works which include alterations or additions to it.

The appellants say, with truth, that there is no definition of alterations or additions or any limit as to the extent of the alterations or additions to which subsection (3) refers. On the other hand, the War Damage Commission argue that the subsection assumes and requires that there will be a measure of continuity between, and substantial identity with, the property as it was and the property as it will be when the projected works have been carried out. Admittedly there must be border-line cases in which the test suggested, as I will presently explain, by the War Damage Commission may not be very easy to apply, and it is, of course, obvious that the provisions of section 8 of the Act, and particularly the references to “making good” and to “alterations and additions,” are not capable of a precise definition which can be applied unhesitatingly and automatically to every conceivable combination of circumstances. It is easy to imagine a case in which alterations and additions of quite an extensive character have been made and yet the property remains the same property. It is also easy to imagine other cases in which the alterations and additions have not really made good the damage to an hereditament but have actually destroyed the hereditament itself and put something else in its place, and the problem in these cases is whether or not the hereditaments here have been destroyed or whether they still exist or will exist.

The War Damage Commission, for the guidance of themselves no less than of those with whom they have to deal, have published certain “Practice Notes” dealing almost entirely with this matter of alterations and additions. Prints of these notes are annexed to several of the cases now before me. They have undoubtedly had a very wide circulation. I have on previous occasions had to consider these Practice Notes in other contexts. They have evidently been compiled with very great care, and I am told, and am not surprised to hear, that they have proved extremely helpful in dealing with cases of which these present appeals are examples. I refer particularly to paragraph 4 of the notes which is entitled: “What is making good by works which “include alterations or additions?” So far as is necessary for the present cases I may say that, in my judgment, the contents of that paragraph commend themselves entirely to me, and I will quote its opening sentences as representing what is, in my judgment, the crucial test to be applied: “The test which the “commission will apply in order to decide whether works . . .

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“ constitute making good the war damage or involve the creation
“ of a different property . . . is repeated here for convenience.
“ It is: ‘ Looking at the works executed, can the property be
“ ‘ fairly described as still the same property as before the war
“ ‘ damage though altered or added to? ’ And it is to be answered
“ on common-sense lines.”

If that is right, and I think it is, I cannot doubt that the proposed new building, in so far as it stands upon the site of any one of these units of property, is not the same property as before the war damage, but a wholly different property. I think that the former property has been altered or added to not only out of all recognition but out of existence. For their own purposes the appellants have adopted a scheme of redevelopment, wholly sensible and desirable, but having only in part the identity of a common site with the buildings which were there before the war damage. I have said that there may be border-line cases, but the present cases, in my judgment, fall without any doubt or question altogether outside any making good of the war damage within the meaning or for the purposes of the Act. In the letter dated July 1, 1955, the matter is stated on behalf of the War Damage Commission in the following words, which appear to me to be entirely convincing: “ From the point of view of physical
“ characteristics a comparison of the original properties and of
“ the proposed redevelopment shows so little correspondence
“ between the old and the new that the commission find it
“ impossible to say of any of the original properties . . . that the
“ war damage will have been made good by works which include
“ alterations or additions to the hereditament but can only
“ conclude that each will have become an indistinguishable part
“ of an entirely different property.”

Some other points were raised during the hearing but, in my judgment, none of them is relevant. I am satisfied that there is no question of estoppel, as there was in *In re 56 Denton Road, Twickenham*,¹ and section 20 of the Act seems to have no bearing on the present cases. This judgment may perhaps be valuable as providing definite judicial approval of the Practice Notes so far as these are relevant to and affect the problems now before me. I cannot believe that on any reasonable interpretation of the quite untechnical expressions in section 8 of the Act the cases now under appeal can be brought within subsection (3).

On the problem of how far this is a question of law, and how far a question of fact, I was referred by Mr. Rowe to a useful

¹ [1953] Ch. 51.

passage from the judgment of Denning L.J. in the case of *Cardiff Rating Authority and Cardiff Assessment Committee v. Guest Keen Baldwin's Iron and Steel Co. Ltd.*²

If this had been a truly border-line case I should have hesitated before disturbing the conclusions arrived at by the War Damage Commission, even though I had myself been disposed to take, on balance, an opposite view. In my judgment, however, this is a clear case, and I think that each of these appeals fails and must be dismissed.

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Appeals dismissed.

Solicitors: *Forbes & Son; Treasury Solicitor.*

K. R. A. H.

² [1949] 1 K.B. 385, 395.

In re BRADLEY, DECD.
BRADLEY v. BARCLAYS BANK LTD.

1956
July 17.

Upjohn J.

[1956 B. No. 1876.]

Practice and Procedure—Parties—Administration action—Insolvent estate—No next-of-kin—Creditor unwilling to be made plaintiff or defendant—Executor unable to maintain administration action against such creditor—Creditor should petition in bankruptcy—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 130 (9)—R.S.C., Ord. 16, rr. 38, 39; Ord. 55, rr. 3, 4, 5, 6; Ord. 70, r. 1.

Bankruptcy—Executor—Insolvent estate—Petition for administration—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 130 (9).

An executor cannot maintain an action for the administration of an insolvent estate against a creditor as defendant where the creditor is unwilling to be made defendant or become the plaintiff himself, and even where from the executor being the sole devisee and legatee no next-of-kin or cestui que trust could become plaintiff or be named as defendant.

The correct procedure in the circumstances is to bring a petition under section 130 (9) of the Bankruptcy Act, 1914, for the administration of the estate.

Mandeville v. Mandeville (1888) 23 L.R.Ir. 339 applied.

Buckle v. Atleo (1687) 2 Vern. 37 and *Rush v. Higgs* (1799) 4 Ves. 638 considered.

PROCEDURE SUMMONS.

The testator, Harold David Bradley, by his will, dated June 20, 1951, appointed his widow, the plaintiff, and another to be his executors, and appointed his widow universal legatee. He

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died on November 9, 1955. She proved the will on May 9, 1956, power being reserved to the other executor to prove; so far he had not done so. At the time of probate the estate was thought to be solvent; and the assets were thought to be worth some £18,000 and the liabilities some £15,000. Since that date the position had changed for the worse, because one asset thought to be of the value of about £10,000—that was, the interest of the testator in the partnership business carried on by him in his lifetime—was now thought to be worth very much less; and, since probate a large number of creditors had come forward, which increased the claims against the estate; and the plaintiff in her affidavit now stated her belief that the estate was insolvent.

It appeared from the schedule of debts that a number of them were from moneylenders and were disputed. It was clear that matters of difficulty would arise in the administration of the estate; in particular, one creditor had already taken proceedings to enforce a claim for money alleged to be lent, and the plaintiff desired to have directions with regard to the defence of that action, and it was thought that there might be other actions of the same nature.

In those circumstances, the plaintiff issued the present summons on June 12, 1956, against Barclays Bank Ltd., as defendants, asking for administration of the estate. The bank were substantial admitted creditors for a sum exceeding some £2,000, but they were unwilling to be made plaintiffs or defendants.

The court was asked to determine whether notwithstanding the defendants' objection to being made defendants, the action was properly constituted against them and could continue.

Raymond Jennings Q.C. and *P. S. A. Rosedale* for the plaintiff, executrix of the testator's estate. The plaintiff as executrix is entitled to an order for administration of the estate, and apart from the difficulty of finding a defendant would be entitled to an order. Notwithstanding the heavy liabilities the estate may be solvent and the plaintiff does not wish to proceed in bankruptcy. The bank does not wish to be made a defendant and contends that the proceedings are not properly constituted.

Under Ord. 55, r. 4, an executor may obtain an order for the administration of an estate, but rule 5, which names the persons to be made defendants, does not refer to creditors; rule 4 is not, however, restricted by rule 5. Moreover, the court has power under rule 6 to add the bank as a defendant. Similarly, Ord. 16,

r. 38,¹ does not mention creditors in the list of persons against whom an executor may obtain an order for administration, but there is power for the court to make the bank a defendant under Ord. 16, r. 39. Under that rule the conduct of the proceedings could have been given to the bank: see *In re Van Oppen*.²

The fact that creditors are not named in Ord. 55, r. 5, or Ord. 16, r. 38, does not invalidate the proceedings, since the court can waive any irregularity under Ord. 70, r. 1.

*Buckle v. Atleo*³ is authority for the proposition that an executor is entitled to an order for administration against a creditor. The question is discussed in Story's Equity Jurisprudence, 12th ed., paras. 544-545. *Buckle v. Atleo*³ appears to have been doubted in *Rush v. Higgs*,⁴ but the latter case was quite different, as there a creditor was already bringing an action at law against the executor, and any remarks about *Buckle v. Atleo*⁵ would be obiter. See also *Owens v. Dickenson*⁶ and

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¹ R.S.C., Ord. 16, r. 38: "Any executor, administrator, or trustee entitled thereto may have a judgment or order against any one legatee, next-of-kin, or cestui que trust for the administration of the estate or the execution of the trusts."

R. 39: "The court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding, to such person as he may think fit, and may make such order in any particular case as he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question."

Ord. 55, r. 3: "The executors or administrators of a deceased person . . . may take out . . . an originating summons . . . for . . . relief of the nature or kind following . . . the determination, without an administration of the estate . . . of any of the following questions . . ."

R. 4: "Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for—(a) the administration of the personal estate of the deceased: (b) the administration of

"the real estate of the deceased . . ."

R. 5: "The persons to be served with the summons under the last two preceding rules in the first instance shall be the following; (that is to say)—A. Where the summons is taken out by an executor or administrator or trustee . . . (e) for relief under subsection (a) of rule 4, the residuary legatees, or next-of-kin, or some of them: (f) for relief under subsection (b) of rule 4, the residuary devisees, or heirs, or some of them . . ."

R. 6: "The court or a judge may direct such other persons to be served with the summons as they or he may think fit."

Ord. 70, r. 1: "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."

² [1935] W.N. 51.

³ (1687) 2 Vern. 37.

⁴ (1799) 4 Ves. 638, 643.

⁵ 2 Vern. 37.

⁶ (1840) Cr. & Ph. 48.

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In re King.⁷ *Mandeville v. Mandeville*,⁸ an Irish case, did not follow *Bucclle v. Atleo*.⁹ In *In re Richardson*¹⁰ it was said that there was no objection to an administratrix bringing an action against the next-of-kin; but here there are no next-of-kin whom the plaintiff could make defendants.

There are before the court the only persons interested in the estate, the plaintiff as executrix and beneficiary and the bank who represents creditors: see Ord. 16, r. 32. The plaintiff will be in great difficulty if she is unable to obtain an order for administration of the estate, and will be quite unable to ascertain her true position. If the proceedings are irregular, this is a case in which the court should find that justice requires it to waive any irregularities in procedure: *Smith v. Baker*.¹¹ [*In re Pink*¹² and *In re Hargreaves*¹³ were also referred to.]

C. R. D. Richmond for the defendants, Barclays Bank Ltd. Creditors are not in the list of persons specified in Ord. 16, r. 38, against whom an executor can obtain an order for administration of an estate; it must have been intended that they should be excluded. *Mandeville v. Mandeville*¹⁴ is on all fours with the present case and lays down that an executor cannot bring an action against a creditor as sole defendant. That was stated in that case to be the practice of the Chancery Division in a letter from the senior Chancery registrar to the Irish court. The plaintiff has no cause of action against the bank, and the bank should not be forced to become a defendant if they do not wish it.

The correct course for the plaintiff is to take proceedings in bankruptcy; provision is made for this position by section 130 (9) of the Bankruptcy Act, 1914: see Williams on Bankruptcy, 16th ed., p. 506. That is the procedure which the plaintiff should adopt in the present circumstances.

Jennings Q.C. in reply. The court has complete discretion to say who should be parties, and has power under Ord. 55, r. 6, to make the bank a defendant. As to bankruptcy, the plaintiff has a right to go in Chancery rather than under the Bankruptcy Act if she prefers.

UPJOHN J. This summons raises a point of some importance on the practice of this court in relation to summonses asking for

⁷ [1907] 1 Ch. 72.

⁸ (1888) 23 L.R.Ir. 339.

⁹ 2 Vern. 37.

¹⁰ (1880) 14 Ch.D. 611.

¹¹ (1864) 2 H. & M. 498.

¹² [1927] 1 Ch. 237.

¹³ (1890) 44 Ch.D. 236; 6 T.L.R. 264.

¹⁴ 23 L.R.Ir. 339.

the administration of the estate of a deceased person where that estate is believed to be insolvent. The matter depends in part on the Rules of the Supreme Court and in part on the practice of the court.

[His Lordship stated the facts and read R.S.C., Ord. 55, rr. 3, 4, 5 and 6; Ord. 16, rr. 38 and 39 and Ord. 70, r. 1¹ and continued:] It is noteworthy that creditors are not included in rule 5 of Ord. 55 or in rule 38 of Ord. 16.

The note to Ord. 70, r. 1, in the Annual Practice states: "Whenever the court is satisfied that substantial justice requires any of its own regulations to be waived, or any slip to be remedied, it will interfere for the purpose; but not where a matter is directly regulated by Act of Parliament."

That paragraph is, in fact, taken from the case there quoted of *Smith v. Baker*.²

It is submitted on behalf of the plaintiff that the action is properly constituted; and that there is power under Ord. 55, r. 6, for the court to add the bank or to make the bank a defendant, and that, having regard to the terms of Ord. 70, the fact that the creditors are not named in Ord. 16, r. 38, and Ord. 55, r. 5, does not render the proceedings void or open to other objection.

The plaintiff has already tried to obtain a friendly creditor to institute proceedings against her; she has, apparently, been unsuccessful. Apart from a few small debts, the creditors are either secured, or have declined to become plaintiffs, or have disputed claims, which would make them unsuitable plaintiffs, and she contends, in those circumstances, that the action is properly constituted and ought to be allowed to go forward, notwithstanding that the defendants object to that course.

I have been referred to a number of authorities. The first is of respectable antiquity, *Buckle v. Atleo*³ being in the year 1687, and heard before Lord Chancellor Jeffreys. The headnote is this: "An executor being desirous to apply the assets, as far as they would go, in satisfying the debts, brings a bill against all the creditors, that they might, if they pleased, contest each others debts, and that their preference might be settled. Adjudged on demurrer to be a proper bill." The judgment is very short and does no more than restate the headnote. That authority is in favour of the course that the plaintiff is taking.

That case was considered in a later authority of *Rush v. Higgs*,⁴ where Lord Loughborough L.C. expressed doubts about

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¹ See footnote 1, ante 617.² (1864) 2 H. & M. 498.³ (1687) 2 Vern. 37.⁴ (1799) 4 Ves. 638, 643

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Buckle v. Atleo ⁵; but, with all respect to him, *Rush v. Higgs* ⁶ was a very different case, for there the creditor was bringing an action at law against the executor, and there having been no decree for administration the Lord Chancellor refused to grant an injunction restraining the creditor from proceeding at law. That was, therefore, a different case from *Buckle v. Atleo*.⁷

On the other side there is an Irish case in the Court of Appeal which is completely in point, *Mandeville v. Mandeville*.⁸ The headnote is: "An executor cannot maintain an action for "administration against one creditor as sole defendant, even "where, from the executor being the universal devisee and "legatee, no next-of-kin or cestui que trust could become plaintiff "or be named defendant." That, of course, is exactly this case.

That case went to the Court of Appeal and was heard by Lord Ashbourne C., FitzGibbon, Barry and Naish L.JJ.

Before giving judgment they caused a letter to be written to the senior chancery registrar of the Chancery Division asking ⁹: "Has "the question been raised or considered whether an executor can "maintain a suit for administration against one creditor as sole "defendant?" The senior registrar of the Chancery Division wrote back and said ¹⁰: "In reply to your letter of March 5, I beg "to say that we know of no case in which the question to which "you refer has been considered, nor can we find that a suit has "ever been so instituted. Among other difficulties real estate is "only made assets at the suit of a creditor suing on behalf of "himself and all other creditors."—That sentence, of course, has no application today—"I may, perhaps, be allowed to add that "the state of circumstances mentioned in your letter has arisen, "and in such cases the course adopted was, that the devisee and "legatee procured a friendly creditor to institute a suit on behalf "of himself and all other creditors against the devisee and "legatee, and the estate was, in this way, administered by the "court."

In the course of his judgment FitzGibbon L.J. said this ¹¹: "On principle, I cannot see that an executor has any equity to "force a creditor to ascertain his legal rights in Chancery when he "prefers not to do so."

The practice has always been, in my experience, that stated in the letter which I have just read from the senior registrar of this

⁵ 2 Vern. 37.

⁶ 4 Ves. 638.

⁷ 2 Vern. 37.

⁸ (1888) 23 L.R.Ir. 339.

⁹ Ibid. 341.

¹⁰ Ibid. 342.

¹¹ Ibid. 343.

division to the Irish court, namely, that a friendly creditor is procured to institute proceedings.

That is well illustrated in *In re Van Oppen*,¹² where the proceedings were started on the footing that the estate was solvent, and therefore beneficiaries or next-of-kin had been added, and it was then found that the estate was insolvent; and Farwell J. held that, by reason of the insolvency, the proceedings ought to be reconstituted by making the creditors plaintiffs and the executors becoming defendants along with the beneficiaries, the beneficiaries merely remaining defendants in order that their costs might at the proper time be provided for. That was the practice laid down in 1935. The earlier practice, as appears from *In re Richardson*,¹³ was merely to give conduct of the proceedings to a creditor. Jessel M.R. said this¹⁴: "The action was instituted "by the administratrix against the next-of-kin: there is no "objection to that: the action could not have been instituted by "her in any other way. After it had been going on for some "time, an order was made giving the conduct of the action to "certain creditors of the intestate."

I do no more than mention *In re Pink*,¹⁵ where Clauson J. held that the action was originally wrongly constituted, but it does not appear whether it was wrongly constituted because the defendant was not a creditor, or whether, had she been a creditor, she would have been a wrong defendant.

If a personal representative cannot join any next-of-kin because they have no interest as in this case, and if the personal representative cannot find a creditor who is willing to be plaintiff, I do not say that the proceedings are nugatory if a creditor is willing to be joined as defendant; and it seems to me that Ord. 70, r. 1, would cover such a case. But ought I to insist on an action proceeding against a creditor who is unwilling to be a defendant? In my judgment, I ought not, and I respectfully agree with the observations of FitzGibbon L.J. which I have already read. I cannot see that the personal representative has any equity to bring a creditor into this court against his will. Moreover, the rules, as I have pointed out, make no provision for such a course.

It is said that the plaintiff will be exposed to much difficulty and doubt in the administration of the estate if I do not allow these proceedings to continue, but, indeed, section 130 of the

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¹² [1935] W.N. 51.¹³ (1880) 14 Ch.D. 611.¹⁴ *Ibid.* 612.¹⁵ [1927] 1 Ch. 237.

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Bankruptcy Act, 1914,¹⁶ deals with the very case which has arisen today. [His Lordship read section 130 (9) of the Bankruptcy Act, 1914.]

Accordingly, the plaintiff is in no difficulty at all; she can petition for the estate to be administered in bankruptcy, and she will be completely protected. Therefore it would be wrong for me to allow this summons to proceed, and accordingly I must dismiss it with costs.

Summons dismissed.

Solicitors: *Sidney Pearlman; Durrant Cooper & Hambling.*

I. G. R. M.

¹⁶ Bankruptcy Act, 1914, s. 130:
“(9) A petition for the administration
“of the estate of a deceased debtor
“under this section may be presented
“by the legal personal representative
“of the debtor; and, where a petition

“is so presented by such a repre-
“sentative, this section shall apply
“subject to such modifications as
“may be prescribed by general rules
“made under subsection (11) of this
“section.”

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June 22,
25, 26;
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COMMITTEE AND OTHERS.

[1955 B. 121.]

Lord
Evershed M.R.,
Jenkins and
Hodson L.JJ.

Charity—Cy-près doctrine—Hospital—Appeal for funds for erection and maintenance of hospital—Scheme impracticable—Whether funds held on resulting trust or to be applied cy-près—Presumed intention of donors—Whether donations for particular objective or with general charitable intent—Effect of mixing gifts from anonymous and identifiable sources.

Between 1924 and 1942 appeals were made for contributions to a fund known as the Ulverston and District New Hospital Building Fund. The response to the appeals was insufficient to carry out the purpose of the fund and, the National Health Service Act, 1946, having come into force, the trustees sought the direction of the court as to what should be done with the money in their hands. Some of the money had been contributed by named donors and the rest collected from unidentifiable sources, such as anonymous donors, street collections, entertainments, etc. :—

Held, (1) that the fund had been collected with the sole object of building and maintaining a new hospital and not for the general charitable purpose of improving facilities for medical and surgical treatment in the districts to be served by the hospital.

(2) That although the contributions received from named or identifiable donors had been mixed with contributions received in circumstances which indicated that the donors would not expect to get their money back, no general charitable intent should for that reason be imputed to the identifiable donors.

In re Hillier's Trusts [1954] 1 W.L.R. 700; [1954] 2 All E.R. 59 explained.

(3) That the particular charitable purpose for which the fund was intended having failed ab initio, the money in the hands of the trustees received from identifiable sources was held on resulting trusts.

In re Welsh Hospital (Netley) Fund [1921] 1 Ch. 655 distinguished.

Semble, where the circumstances in which a fund is raised leave it open whether named subscribers did or did not contribute with a general, as distinct from a particular, charitable intention, the inclusion in the fund of contributions from anonymous sources would be a relevant factor in favour of deciding that the gifts had been made with a general intention in favour of charity.

Per Jenkins L.J. Donations from unidentifiable donors given out-and-out without any indication of what it was intended should be done with the money if the purpose should prove to be impracticable might be *bona vacantia*.

APPEAL from Sir Leonard Stone V.-C. sitting in the Chancery Court of the County Palatine of Lancaster, Manchester Division.

The Ulverston Cottage Hospital was built in or about the year 1872 at Newton Street, Ulverston, in the County of Lancaster, for the purposes of providing medical care and attention to the people living in the urban and rural districts of Ulverston. The hospital was, until the coming into operation of the National Health Service Act, 1946, managed by a management committee elected annually by subscribers and was supported by voluntary contributions. By 1924 it had been long apparent that the hospital was inadequate for the needs of the area served by it, which at that time included in addition to the Ulverston area, the urban districts of Dalton-in-Furness and Grange-Over-Sands.

At the annual general meeting of subscribers to and friends of the hospital held on June 19, 1924, resolutions were passed to the effect that a movement be initiated for a new hospital, and that the management committee be asked to consider the matter and as soon as practicable to submit a scheme to a special meeting of such subscribers and friends. Largely owing to a

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period of trade depression in the area, which made the time inopportune for the raising of funds, little or nothing was done to implement these resolutions until 1927.

At the annual general meeting held on July 20, 1927, the plaintiff, Henry Forrest Birkett, as chairman, declared the fund open under the name of the Ulverston and District New Hospital Building Fund, and invited the help of the people of the district. He pointed out, however, that the real effort had to be further postponed owing to the depressing trade conditions. In 1928 he made a personal appeal by letter to persons resident in the Ulverston Urban and Rural Districts; and at the annual general meeting held on May 23, 1928, he was able to announce that he had received promises of subscriptions amounting to £2,721. Observations attributed to him in the minutes of this meeting showed that the object for which the fund was being raised was, as its name implied, the building of a new hospital, with an adequate margin for upkeep.

Shortly after this the chairman approached the defendants, the Swarthmoor and Ulverston Co-operative Society Ltd., and on July 30, 1928, at the meeting of the management committee of that society it was resolved that a grant of £50 from the reserve fund should be made each half-year for a period of five years to the new hospital building fund, and at the half-yearly meeting of the members of the society held on August 20, 1928, that resolution was adopted and approved.

Thereafter, fairly substantial sums were contributed year by year, partly by subscribers who gave their names, partly in the form of bequests, and partly by sums from anonymous sources, including the proceeds of whist drives, rummage sales, entertainments and the like. The appeal was carried on by committees formed in the four districts served by the cottage hospital and by a sub-committee of the committee of management of that hospital. The annual report for the year ending December 31, 1929, showed that the new hospital fund and everything to do with it was kept separate from the other funds and activities of the existing cottage hospital. Separate accounts were published and at the end of the financial statement there were two forms of legacy printed. The first was headed "Form of legacy. Ulverston and District Cottage Hospital. By gift the sum of . . . pounds, free of duty, to be paid to the treasurer for the time being thereof for the general purposes of the said hospital . . ." The other form was "New Hospital Fund. I give to the Ulverston and District Cottage Hospital the sum of . . .

“ pounds, free of duty, to be paid to the treasurer for the time
 “ being thereof for the purposes of the new hospital fund of the
 “ said hospital . . . ”

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On February 5, 1930, at the meeting of the management committee of the hospital the chairman reported a meeting convened by Sir Mathew Fell, the treasurer of the new hospital fund, for the purpose of enlarging the appeal for the new hospital. The appeal took the form of a letter which was printed in the local press on March 15, 1930 (and which by the time the matter came before the courts in 1955 was the sole surviving written or printed appeal made on behalf of the fund although publicity had been given in the local press to the proceedings and activities of the various committees).

The response to the appeal was never on anything like the scale required to finance the building of a new hospital. In 1937 there were negotiations between the Lancashire County Council and the organizers of the fund with a view to providing a new hospital as a joint venture. But these negotiations came to nothing, and thereafter contributions to the fund rapidly dwindled, amounting to under £8 in 1937 and ceasing altogether in or about 1942. The inadequacy of the response to the appeal, coupled with the failure of the negotiations with the Lancashire County Council, made it reasonably plain by 1937 that there was no practical possibility of carrying out the purpose for which the fund had been raised, and any hope to the contrary was finally dispelled by the passing of the National Health Service Act, 1946.

In 1955, the trustees of the fund applied by petition to the Chancery Court of the County Palatine of Lancaster for the determination (with consequential relief) of the questions: (1) whether the whole or any, and if so what part, of the fund was held upon a general charitable trust and fell to be administered *cy-près*; and (2) alternatively, whether the whole or any, and if so what part, of the fund was held by the trustees on a resulting trust for any, and if so which, of the donors to the fund. There were joined as defendants to the application the Barrow and Furness Hospital Management Committee established under the National Health Service Act, 1946, who made no claim to the fund and, therefore, passed from the case, the Swarthmoor & Ulverston Co-operative Society Ltd. as representative of the individual (as distinct from anonymous) donors to the fund, and the Attorney-General of the Duchy as representing the interests of charity generally.

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Sir Leonard Stone V.-C., having found that the sole objective of the appeal was the building of a new hospital at Ulverston and its maintenance, held that that purpose having become impracticable the donors, so far as identifiable, were entitled to a return of their money. Accordingly, he declared that the co-operative society were entitled to that proportion of the net fund realized after payment of costs and expenses as the £500 contributed by the society bore to the total funds collected (which at the relevant time amounted with accumulations of income to about £32,000). He directed an inquiry as to the donors of the fund and the amounts of their subscriptions. The Attorney-General of the Duchy of Lancaster appealed.

E. Milner Holland Q.C., the Attorney-General for the Duchy of Lancaster and the Queen's Sergeant within the County Palatine of Lancaster (*P. A. Ferns* with him). The tenor of all the documents is that the objective of the appeal was the general charitable intention of improving hospital services in the district and the appeal was not for the sole purpose of building a new hospital. The proposal to build a new hospital was merely a mode of carrying out that general intent. Even if the fund was for the purpose of building a new hospital for a particular district, persons subscribing to it would, in the absence of special circumstances, be taken to have the general intention of assisting the sick in that district within the broad field of medical and surgical relief. The present appeal was not limited in its application to one specific place and institution, as was the case in *In re University of London Medical Sciences Institute Fund*¹ and in *In re Wilson*.² *Biscoe v. Jackson*³ is in point here.

In deciding for what purpose a fund was raised, evidence as to the intention of the donors is only admissible if it was expressed at the time when the gift was made. Once a general charitable intent has been established the same motive will be attributed to all the donors unless there are special circumstances or express reservations to the contrary. It is not open to an individual donor to say that he had some motive peculiar to himself which was locked in his mind at the time when the gift was made. If it were otherwise extensive inquiries would have to be directed in every case of this type as to the intention of individual donors. Even if no general charitable intent can be deduced from the nature of the appeal, the way in which the money was collected

¹ [1909] 2 Ch. 1; 25 T.L.R. 353.³ (1887) 35 Ch.D. 460.² [1913] 1 Ch. 314.

implies that the donors intended to devote their money irretrievably to charity. The donors are divisible into two classes. First there are the unidentifiable donors who contributed to street collections, whist drives and so forth, or who gave anonymously. They must have intended to part with their money out-and-out, and there can, accordingly, be imputed to them a general charitable intention.

[LORD EVERSHERD M.R. It may be that in the absence of proof as to the intention of the anonymous donors the money would be *bona vacantia*.]

In practice the Crown would abandon the money and it would be applied *cy-près*. The second class of donors are those who are identifiable. In the circumstances of this appeal the named donors must be taken to have known that their contributions would be mixed with non-returnable anonymous contributions, and, therefore, they also must be taken to have intended to part irretrievably with their money. *In re Welsh Hospital (Netley) Fund*⁴ shows that the test to be applied is whether the appeal is of such a character that the donors must be taken to have known that the response would be in the form of a mixed fund. *In re Hillier's Trusts*⁵ decides that all contributors to a mixed fund must be treated alike, and it is reasonable to suppose that they would intend to contribute on that footing. Consequently, with the exception of money which was given by named donors expressly for a particular object which has failed, none of it is returnable.

[HODSON L.J. That is inconsistent with what Farwell L.J. said in *In re University of London Medical Sciences Institute Fund*.⁶]

[LORD EVERSHERD M.R. Having formed a view on the question of general charitable intent on the documents in *In re Hillier's Trusts*,⁷ I added that if those documents had been equivocal as to the intent, then other considerations could legitimately be taken into account. Denning L.J. put that in the forefront of his reasoning, but I do not think that, reading my judgment as a whole, I was expressing so broad a proposition.]

It is submitted that your Lordship approved the proposition that where there is a mixed fund it is proper to assume that the same motives are common to all the donors. In *In re Dover's Battle of Britain Memorial Hospital Fund*⁸ Upjohn J. evidently

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⁴ [1921] 1 Ch. 655.

⁵ [1954] 1 W.L.R. 700; [1954] 2

All E.R. 59.

⁶ [1909] 2 Ch. 1.

⁷ [1954] 1 W.L.R. 700.

⁸ The Times, June 29, 1955.

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took the same view of *In re Hillier's Trusts*,⁹ for, having found that there was no general charitable intent, he held that the fact that the subscribers knew that their gifts would be mixed with anonymous gifts made a difference and he was of opinion that he was bound by *In re Hillier's Trusts*.⁹ He was, however, wrong in seeking to draw a distinction between cases of surplus arising after the object of an appeal has been carried out and cases of initial failure such as the present.

In cases such as *In re Wokingham Fire Brigade Trusts*,¹⁰ where it is clear that although the money is given for a specific purpose it is given out-and-out, it is not necessary to consider whether there was any general charitable intent. In *In re British School of Egyptian Archaeology*¹¹ Harman J. said that if a donor gives his money out-and-out it is not necessary to show that he gave with a general charitable intent to disentitle him to have it back.

R. C. Seddon for the plaintiff trustees.

Raymond Jennings Q.C. and *H. C. Easton* for the Swarthmoor and Ulverston Co-operative Society Ltd. *In re Hillier's Trusts*¹² does not lay down a rule of thumb formula. The mixing of contributions from known and unknown donors is only of interest where the intention is equivocal and then only as a supporting consideration. Evershed M.R. in that case only said that it was a relevant consideration where the documents were equivocal, and even that qualified statement should not be given too much weight, for there is a valid distinction between cases where there is an initial failure of the object of the appeal and cases where there is a surplus after the object has been carried out, which, apparently, was not argued in *In re Hillier's Trusts*.¹² If a gift fails because of a condition precedent the donor is entitled to a return of his money, but if the condition failing is subsequent he cannot get it back: see *In re Monk*.¹³ Once money is given out-and-out to charity it does not matter if the object fails subsequently. *In re Hadden*¹⁴ was a case of subsequent failure. In *In re North Devon and West Somerset Relief Fund Trusts*¹⁵ and in *In re Welsh Hospital (Netley) Fund*¹⁶ the particular object of the appeal had taken effect. The only case before *In re Hillier's*

⁹ [1954] 1 W.L.R. 700.

¹⁰ [1951] Ch. 373; [1951] 1 T.L.R. 446; [1951] 1 All E.R. 454.

¹¹ [1954] 1 W.L.R. 546; [1954] 1 All E.R. 887.

¹² [1954] 1 W.L.R. 700.

¹³ [1927] 2 Ch. 197, 211; 43 T.L.R. 256.

¹⁴ [1932] 1 Ch. 133; 48 T.L.R. 9.

¹⁵ [1953] 1 W.L.R. 1260; [1953] 2 All E.R. 1032.

¹⁶ [1921] 1 Ch. 655.

*Trusts*¹⁷ of initial failure was *In re University of London Medical Sciences Institute Fund*.¹⁸ *Biscoe v. Jackson*¹⁹ was explained by Parker J. in *In re Wilson*.²⁰ It was a case where there was a general charitable intent with a particular object grafted on to it.

Where an appeal is for a particular purpose which fails, the money is returnable to the donors so far as identifiable, but contributions from unidentifiable donors have to be treated as non-returnable. An out-and-out gift may evince a general charitable intention. In *In re Wokingham Fire Brigade Trusts*²¹ it was not necessary to consider the question, and it was left open in *In re University of London Medical Sciences Institute Fund*.²² In *In re British School of Egyptian Archaeology*²³ Harman J. did not accept that there was any general charitable intent, but *In re Welsh Hospital (Netley) Fund*²⁴ was on the footing of general charitable intent.

E. Milner Holland Q.C. replied.

Cur. adv. vult.

July 13. JENKINS L.J., delivering the first judgment, stated the facts and continued: Sir Leonard Stone V.-C. was of opinion that the building and maintenance of a new hospital was and remained the sole purpose for which the fund was raised. Accordingly, in his view there was no room for the *cy-près* application of the fund, so far at all events as it represented the contributions of identifiable subscribers. He, therefore, applied the general principle, authority for which, if authority be needed, is to be found in the judgment of Farwell L.J. in *In re University of London Medical Sciences Institute Fund*,¹ to the effect that where a fund has been raised for a particular charitable purpose which fails, the subscriptions received from identifiable donors become subject to a resulting trust for the persons by whom they were contributed, and are returnable to those persons accordingly. In conformity with that principle he declared in answer to the first of the questions above set out, (i) that the co-operative society was entitled out of the assets then representing the fund to be repaid such proportion of the fund remaining after payment of all proper costs and expenses thereout as £500 (being the total amount of the co-operative society's subscription to the fund)

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¹⁷ [1954] 1 W.L.R. 700.

¹⁸ [1909] 2 Ch. 1.

¹⁹ 35 Ch.D. 460.

²⁰ [1913] 1 Ch. 314, 322.

²¹ [1951] Ch. 373.

²² [1909] 2 Ch. 1.

²³ [1954] 1 W.L.R. 546.

²⁴ [1921] 1 Ch. 655.

¹ [1909] 2 Ch. 1, 8; 25 T.L.R. 358.

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bore to the total funds collected; and (ii) that all the persons or bodies who had made individual subscriptions to the fund were entitled to be repaid such proportion of the fund remaining as aforesaid as the total of their subscriptions thereto bore to the total funds collected. No order was made as to the destination of contributions to the fund received from anonymous sources, I gather in the expectation that upon a further hearing of the petition the Attorney-General of the Duchy would, as is usual in such cases, waive any claim he might have to that part of the fund as *bona vacantia* and bring in a scheme for its *cy-près* application for the approval of the court. An inquiry was directed to ascertain what were the subscriptions to the fund and the amounts and sources thereof, and the further hearing of the petition was adjourned with liberty to any of the parties to restore the same on seven days' notice.

From that order the Attorney-General of the Duchy now appeals to this court. He submits that there must be imputed to all subscribers to the fund a general charitable intention to secure the improvement of the facilities for medical and surgical treatment in the districts served by the Ulverston Cottage Hospital, the project of building a new hospital being merely a mode, though no doubt the mode primarily contemplated, of carrying out that general intention; and accordingly that a scheme should be settled for the *cy-près* application of the entire fund. This submission he seeks to support in three ways. First, he says that on the facts of the case the fund was raised for the general purpose above described and not solely and exclusively for the particular purpose of building a new hospital. I cannot accept this argument. The Attorney-General admits that no support can be found for it in the evidence apart from Sir Mathew Fell's letter published in the local press on March 15, 1930. This was a long letter, in the course of which the writer adverted to needs over and above the actual building and maintenance of the new hospital. I do not propose to burden this judgment with quotations from it, for I am in complete agreement with the view expressed by the learned Vice-Chancellor, who said: "... In my opinion it adds nothing to the only purpose for which the appeal was originally made, namely, for the building of a new hospital at Ulverston. That remained the sole objective."

Secondly, says the Attorney-General, even if the fund was raised for the particular purpose of providing a new hospital adequate to the needs of the districts served by the Ulverston Cottage Hospital, that purpose, being for the benefit of the

districts concerned, in itself involved the more general charitable purpose of benefiting the inhabitants of those districts in other ways within the broad field of medical and surgical relief. For this proposition he relied on *Biscoe v. Jackson*,² where a testator made a bequest for the establishment of a soup kitchen and cottage hospital for a particular parish. This object proved impossible of fulfilment because no land available for the purpose under the law of mortmain as it then stood could be obtained within the parish in question. It was, however, held in the Court of Appeal, affirming Kay J., that the gift disclosed a sufficient intention of charity for the benefit of the poor in the parish to entitle the court to execute the trust *cy-près*, and to direct a scheme for that purpose to be settled. I do not think that case affords any real assistance to the Attorney-General's argument. As was observed by Parker J. in *In re Wilson*³: "Of course, "where there is a particular gift for charitable purposes, if you "come to analyse the intentions of the testator, the intentions of "the testator must have been to benefit those persons who will, "if the particular direction is carried out, take the benefit of "that particular direction, and, if from that you draw an "inference that the general and paramount intention was to "benefit those persons, it enables you to disregard the particularity of the gift and to give effect to that general intention as "opposed to the particular intention. I do not think that that "can be the effect of *Biscoe v. Jackson*.⁴ It seems to me that "there the court was able to gather—whether I should have come "to the same conclusion myself I do not know, because in cases "like that different minds may very well take different views—"that there was a general paramount intent for the benefit of "the poor of a certain parish, although the particular directions "were to establish a soup kitchen and a cottage hospital for the "parish."

It is to my mind one thing to hold, on the language of a particular will, that a testator who constitutes a trust of his own devising for the purpose of relieving the poor of a given parish in some special way, has by the terms of his gift manifested a general intention of charity for the benefit of the poor of that parish; and quite another thing to impute to a testator or subscriber who bequeaths or subscribes money to a particular existing fund raised solely and exclusively for some particular charitable object, an intention to devote the sum bequeathed or

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² (1887) 35 Ch.D. 460.⁴ 35 Ch.D. 460.³ [1913] 1 Ch. 314, 322.

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given to some general charitable purpose over and above the sole and exclusive object of the fund to which it is bequeathed or given. xIt is to my mind not open to doubt that a testator who bequeaths or a subscriber who gives money to a fund raised for the sole and exclusive purpose of building a new hospital at "X," with nothing beyond the bare fact of the gift to indicate his intention, must be taken to have bequeathed or given the sum in question for that sole and exclusive purpose and nothing else. xAccordingly, I think that the Attorney-General's second argument also fails.

But, thirdly, the Attorney-General raises an argument based on the inclusion in the fund of sums received from anonymous sources. That argument is of this nature. yPeople who contribute to a fund of this sort by putting cash into a collecting box, paying the entrance fee for a whist drive, or entertainment, or the like, or indeed people who send money direct to the organizers with nothing to indicate the identity of the donor, contribute in circumstances in which it is for all practical purposes impossible that their money should be returned to them in the event of the failure of the avowed object of the fund. y Such persons obviously do not expect to see their money back, whatever the fate of the appeal may be, and must thus be taken to have parted with it out-and-out. y If they have parted with their money out-and-out they must be taken to have done so with a general charitable intention, or, in other words, to have devoted their money irretrievably to charity. x But if that is the case as regards anonymous contributors, it follows that subscribers who give their names and are aware that their subscriptions will be mixed with non-returnable contributions from anonymous sources, must be taken to have contributed with a similar general charitable intention. I am not sure whether this imputation of a general charitable intention by way, as it were, of infection from the anonymous contributors, is to be regarded as applying to all subscribers, or only to those who subscribe after the first anonymous contribution has been made, and can be shown to have known that it has been made. Perhaps it should extend to all subscribers on the footing that all subscribers to a fund of this type know or must be taken to know as a matter of common knowledge that such funds are almost invariably made up in part of sums derived from anonymous sources. So far as the particular subscriber joined in the present case, namely, the co-operative society, is concerned, it is clear from further evidence read with leave in the course of the appeal

that, although the learned Vice-Chancellor had understood otherwise, the first anonymous contributions had in fact come in before the co-operative society had made its first payment to the fund under a resolution passed at the society's half-yearly meeting on August 20, 1928, to the effect that the society should subscribe £500 by 10 half-yearly instalments of £50. But whether the society knew at the date of such resolution that anonymous contributions had been made to the fund does not appear. What does clearly appear from the evidence filed on behalf of the society is that, so far as actual, as distinct from imputed, intention goes, the society's intention was to subscribe towards the cost of building the proposed new hospital and nothing else.

If the matter were free from authority I would have little hesitation in rejecting the Attorney-General's third argument. I appreciate that anonymous contributors cannot expect their contributions back in any circumstances, at all events so long as they remain anonymous. I appreciate also the justice of the conclusion that anonymous contributors must be regarded as having parted with their money out-and-out, though I would make a reservation in the case of an anonymous contributor who was able to prove conclusively that he had in fact subscribed some specified amount to the fund. If the organizers of a fund designed exclusively and solely for some particular charitable purpose send round a collecting box on behalf of the fund, I fail to see why a person who had put £5 into the box, and could prove to the satisfaction of the court he had done so, should not be entitled to have his money back in the event of the failure of the sole and exclusive charitable purpose for which his donation was solicited and made. That, however, is a minor point. I find a more serious difficulty in the inference that, because the anonymous donors have given their money out-and-out, therefore a general charitable intention must be imputed to them, however exclusive and specific the avowed purpose of the fund may be. I should have thought it at least arguable that such persons intend to subscribe to the avowed purpose and nothing else, and simply assume that the avowed purpose will in fact be carried out, without forming any intention at all as to what is to be done with their money in the event of that purpose becoming impossible of fulfilment. On that view of the state of mind of the anonymous contributor it might well be held that in the event which happened the anonymous contributor had simply abandoned his contribution so that it became bona vacantia on the failure

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of the purpose for which it was contributed. This, however, is of little practical importance if, in accordance with the usual practice, the Attorney-General waives the claim of bona vacantia and brings in a scheme for the cy-près application of the part of the fund derived from anonymous sources.

But it is at the third and final step in his argument that I wholly part company with the Attorney-General. Speaking for myself, I entirely fail to see why the imputation of a general charitable intention to anonymous contributors (if rightly made) should afford any ground for imputing a general charitable intention to subscribers who give their names. Suppose subscriptions are solicited for a fund expressly announced as a fund to be raised for the purpose of building a new hospital at "X" and to be applied exclusively for that purpose alone. Suppose, further, that certain persons contribute to the fund by putting cash into collecting boxes sent round on behalf of the fund, and later some other person who knows that money has been subscribed in that way sends a subscription to the fund with a covering letter giving his name and address. Prima facie, the subscriber who gives his name intends to subscribe for the particular and exclusive purpose for which his subscription has been solicited and none other, and there will be a resulting trust in his favour if that purpose fails. Even if a general charitable intention is rightly to be attributed to the anonymous contributors to collection boxes, neither the fact that they have chosen to contribute in that way, nor the named subscriber's knowledge that anonymous contributions have been made in that way, seems to me to have any bearing on the intention of the named subscriber.

But the matter is not free from authority. The Attorney-General referred us to *In re Welsh Hospital (Netley) Fund*,⁵ which was a case concerning the disposal of a surplus of £9,000 remaining after winding up the affairs of a hospital erected at Netley, and equipped and run during the First World War for the benefit of sick and wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. It would seem from the report that the terms of the appeals in response to which the fund was raised were not such as in themselves to justify the conclusion that persons who subscribed to the fund did so with a general charitable intention. But in holding that the surplus was applicable cy-près on the ground of general charitable intent, P. O. Lawrence J. did clearly found himself to a great extent on the inclusion in the fund of moneys derived from anonymous

⁵ [1921] 1 Ch. 655.

sources. He said⁶: "In order to determine this question the court must first of all ascertain whether the fund is devoted permanently to charity and can be applied under the doctrine of *cy-près*. This, in turn depends upon what the court ought in the circumstances to infer to have been the true intention of the subscribers to the fund when they made their contributions." Later he said⁷: "The fund was created by contributions from various sources and in varying amounts, partly by donations from private individuals of more or less substantial amounts, and partly by the proceeds resulting from concerts and other entertainments given and from collections in streets and at churches made in most of the towns and villages of Wales. So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out-and-out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it. So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be earmarked. They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out-and-out, and that they did not intend that the surplus, if any, of their contributions should be returned to them when the immediate object of the charity should have come to an end."

With regard to this case, I would observe that it concerned the disposal of a surplus after the immediate purposes for which the fund was raised had been fully fulfilled, and not a case of

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⁶ [1921] 1 Ch. 655, 658.⁷ *Ibid.* 660.

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total failure ab initio like the case with which we now have to deal. It seems to me that this makes a material difference. The intention of a subscriber might well be that his contribution should be returned in the event of a total failure ab initio of the purpose for which he made it, but that in the event of a surplus being left over after that purpose had been duly fulfilled, any share in such surplus which might be regarded as representing his subscription or some part thereof should be permanently devoted to charity. In forming his intention as to the fate of his contribution in the latter event (if, indeed, he formed one at all) he might well be influenced by the fact that the inclusion of contributions from anonymous sources, and the indiscriminate spending of a mixture of anonymous contributions and contributions from named subscribers, would make it impossible to ascertain whether the whole or any and, if so, what part of any particular contribution had been spent. In the case of initial failure different considerations apply, for the whole of the fund is ex hypothesi intact and there has been no effective application of it for the purpose for which it was raised. Moreover, I think the *Welsh Hospital* case⁸ might well have been decided the same way simply on the strength of the language of the appeals; and quite apart from that I think it might well have been held that once the charity for which the fund was raised had been effectively brought into action the fund was to be regarded as permanently devoted to charity to the exclusion of any resulting trust. In this connexion I would refer to the following passage from the judgment of Sargant L.J. in *In re Monk*⁹: "The case is quite different from that of *In re Wilson*,¹⁰ so much relied on by the appellants, where the application of any part of the fund was dependent on the constitution of the whole scheme. If there should be any failure here it would be in the nature of a partial failure by matter subsequent, not as there, a total failure through failure of a condition precedent. Counsel for the respondents were not able to cite any case in which, a charity having actually been put into operation and having afterwards proved incapable of exhausting the whole charitable fund, it had then been held that there was a resulting trust for the donor, or in the case of a will for his next-of-kin."

Reference may also be made to the decision of Danckwerts J. in *In re Wokingham Fire Brigade Trusts*,¹¹ where the surplus

⁸ [1921] 1 Ch. 655.

⁹ [1927] 2 Ch. 197, 211; 43 T.L.R.

¹⁰ [1913] 1 Ch. 314.

¹¹ [1951] Ch. 373; [1951] 1 T.L.R. 446; [1951] 1 All E.R. 454.

funds of a disbanded local fire brigade were held to be subject to public charitable trusts and applicable cy-près. Danckwerts J. said ¹²: "It seems to me, therefore, that the assets and funds "were subject to public charitable trusts. Those trusts have "obviously been in operation for a number of years and that rules "out any other application of the fund. I think that the subscribers intended to part with all interest in the subscriptions "when they made them for the benefit of this public purpose. "I do not believe that at that time they had any intention as to "the future disposal of the money; and I do not think that that "was taken into account. The only thing which I think they "took into account was the provision of the fire brigade, or the "equipment for the fire brigade; and, that being so, the funds "were subscribed out-and-out for a charitable purpose. Though "that purpose is no longer practicable by reason of the sale of "the assets to a different body charged with the duties, the "charitable trusts do not fail. It is not necessary to consider "whether there was any general charitable intention, and the "trusts should be modified by means of a cy-près application. "The declaration is that the funds were held on charitable trusts "for the benefit of Wokingham and adjoining districts and should "now by order be applied cy-près by means of a scheme."

It will be seen that Danckwerts J. said that it was not necessary to consider whether there was any general charitable intention. I think that observation was right in the circumstances of the *Wokingham Fire Brigade* case,¹³ and would have been equally appropriate in the *Welsh Hospital* case.¹⁴

For these reasons I cannot regard the *Welsh Hospital* case¹⁴ as providing any real authority for the Attorney-General's argument in a case of total failure ab initio such as the present case.

The Attorney-General also referred us to the recent case in this court of *In re Hillier's Trusts*,¹⁵ on which he relied as authority for the proposition that even in the case of a total failure ab initio of the purpose for which a fund is raised, the inclusion in the fund of contributions from anonymous sources has the effect of fixing named subscribers with a general charitable intention so as to exclude any resulting trust and make the fund a proper subject of cy-près application. It is true that *In re Hillier's Trusts*¹⁵ resembles the present case in that it was a case of total failure ab initio, and not a case of surplus like the

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¹² [1951] Ch. 373, 377.¹³ [1951] Ch. 373.¹⁴ [1921] 1 Ch. 655.¹⁵ [1954] 1 W.L.R. 700; [1954]

2 All E.R. 59.

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Welsh Hospital case,¹⁶ but it differed from the present case in other, as I think, important respects.

The head-note, which I think adequately summarizes the facts for the present purpose, is in these terms: "In 1938 and 1939 an appeal was launched for the improvement of hospital services in South Bucks and East Berks, and in particular for the erection and maintenance of a new hospital at Slough. The appeal was launched by a 'council' who issued a brochure calling for subscriptions and donations. This pointed out the serious lack of hospital accommodation in the area, and emphasized at length and in the strongest terms the superior advantages of 'the truly British characteristic of making provision, without force' for medical care in voluntary hospitals. The brochure was accompanied by forms to be filled in by donors and subscribers, of which 'document 1' provided for subscriptions in three forms, viz.: 'council's discretion': [for a] Windsor Hospital; 'Slough Hospital.' Another form, 'document 2,' provided for seven year covenants to subscribe towards the augmentation of the income or capital of (a) such hospitals as the council might nominate; (b) the Windsor Hospital; (c) the Slough Hospital, and (d) a hospital nominated by the covenantor. Substantial sums were received under the terms of these documents, and were also raised locally by concerts, church collections, whist drives, etc. It never became possible to build the proposed hospital at Slough; first, because of war conditions, and, secondly, because the provisions of the National Health Service Act, 1946, precluded the erection of new voluntary hospitals. A summons was taken out by the Slough trustees for directions as to what should be done with the property in their hands; and in particular for the determination of the questions whether (a) any charitable trust formerly affecting the same had failed, and if so (b) whether there was a resulting trust in favour of the donors and subscribers. On appeal from Upjohn J.: *Held* (*per* Evershed M.R., and Denning L.J., Romer L.J. dissenting), that on the true construction of documents 1 and 2 and the surrounding circumstances no definable class of donors was entitled to claim the return of their donations. Those donors who had allocated in writing their donations to the Slough hospital showed a general intention to provide a Slough hospital, but it was not of the essence of that intention that the Slough hospital should be a voluntary hospital, and there was a

¹⁶ [1921] 1 Ch. 655.

“presumption in favour of a charitable intent. There might, however, be exceptional donations to which special conditions had been attached and inquiry should be directed to discover whether any such gifts had been received. *In re Wilson* ¹⁷ applied. Decision of Upjohn J.¹⁸ varied.”

It is clear from these facts that the avowed objects of the fund were such as to afford grounds wholly absent in the present case for imputing to subscribers a general charitable intention. It is also clear that a subscriber making use of the subscription form or the seven year covenant form and striking out all the listed purposes other than Slough Hospital need not necessarily have intended to limit his bounty to that one particular object, but might equally well have intended to indicate Slough Hospital as the preferred object of his bounty, without any intention of excluding the other objects listed in the event of the preferred object failing. Evershed M.R. said ¹⁹: “I agree with Upjohn J. that if the particular circumstances in which one donor has made his donation—including his own written statement at the time of making it—lead to a clear conclusion on the question of his intention, that that conclusion cannot be changed because other persons giving to the same cause in different circumstances must be taken to have had a different intention. But where, as I think in the present case, the circumstances affecting the presumed intention of the first donor are, at best, equivocal, then, as it seems to me, it is a relevant and admissible fact in determining his true intention that when he contributed to the fund, he must be taken to have known that his contributions would be mingled with thousands of others, substantial numbers of whom were contributing in circumstances which negated any right or expectation on their part to any return of their money in any circumstances.”

Evershed M.R. said further ²⁰: “Regarding, therefore, as I do, the language of the brochure, even when taken in conjunction with document 1, suitably employed, as at best in some degree equivocal, I come to the conclusion that the various other facts which I have enumerated are relevant and admissible for consideration and render it impossible to find or presume, as regards any class of donors, an intention such as to entitle them, in the events which have happened, to a return of any part of their donation. In my judgment, there is no good

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¹⁷ [1913] 1 Ch. 314.¹⁹ [1954] 1 W.L.R. 700, 712.¹⁸ [1954] 1 W.L.R. 9; [1953] 2²⁰ *Ibid.* 713.

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“ answer to the summary of his argument which Mr. Cross put
“ before us, which was to this effect: It is sought to find a
“ common intention, limited to a single and specific object,
“ among all givers of a particular category; the particular
“ category put forward is that of donors who, in response to the
“ brochure, made use of document 1 to specify the Slough
“ Hospital; but whatever might be the interpretation properly
“ put upon these documents, as it were, in vacuo, the fact is
“ that the category selected not only included persons who sub-
“ scribed after the passing of the Act, but also consisted of
“ persons who must be taken to have been aware of the pre-
“ brochure contributions, and aware also of the fact that their
“ gifts would be intermingled with those of others who would
“ not in any circumstances expect, or be entitled to claim, a
“ return of their money; and, therefore, no such intention can be
“ found common to donors of a particular category differentiating
“ them from the rest of the contributors on whose part no claim
“ for any return could be substantiated. More briefly, but, in
“ my judgment, no less correctly, the matter was thus put by
“ Mr. Buckley in reply when he said that where there are many
“ sources of contribution to a charitable fund, then all contribu-
“ tors should, in the absence of special circumstances, be taken
“ to contribute on terms common to all; and the only such terms
“ possible in the present case deny any right to a return of their
“ money to all contributors.”

I do not think that these passages, read in their context and with reference to the facts of the particular case then before the court, can be regarded as supporting the general proposition for which the Attorney-General contends. In my view, Evershed M.R. was not seeking to lay down a general principle to the effect that in all cases where a fund of this kind is found to include contributions from anonymous sources, a general charitable intention must be imputed to the named subscribers, however clear it may be that their subscriptions were solicited and made solely and exclusively for one particular purpose. I think his observations as to the effect of the inclusion in the fund of contributions from anonymous sources were intended to be confined to cases comparable to the one then in hand, that is to say, cases in which the circumstances in which the fund is raised are such as to leave it open to doubt whether the named subscribers did or did not contribute with a general as distinct from a particular charitable intention. In such cases the inclusion of anonymous contributions is a factor which—so Evershed M.R. held—may be taken into

account for the purpose of resolving the doubt in favour of a general charitable intention. The judgment of Denning L.J. goes a great deal further than that of Evershed M.R., and, if I may venture to say so with the greatest respect, I think it goes further than was necessary for the decision of the case; and in view of the strictly limited use made by Evershed M.R. of the factor of anonymous contribution, and the dissenting judgment of Romer L.J., I cannot regard it as representing the opinion of the court. It might or might not be desirable for the law to be altered so as to make all funds subscribed for charitable objects which fail applicable *cy-près* for other charitable purposes to the exclusion of any resulting trust in favour of the donors. But I cannot agree that the law as it stands is to that effect.

For these reasons I think the learned Vice-Chancellor came to a right conclusion in this case, and I would dismiss the appeal.

HODSON L.J. I agree with the judgment that Jenkins L.J. has read, and I will now read the judgment of Lord Evershed M.R.

LORD EVERSLED M.R. (read by Hodson L.J.). I agree that the appeal should be dismissed for the reasons stated by Jenkins L.J.

Having regard, however, to the importance attached by the Attorney-General to the case in this court of *In re Hillier's Trusts*,²¹ and to certain parts of my own judgment in that case, I have thought it right that I should reconsider the language of that judgment. It was, and after this further consideration still is, my view that, having regard to the terms of the brochure (there referred to) which constituted the relevant appeal for donations, those who made use of the form, called in the case document 1, in sending their donations in response to the appeal, could not be said to have subscribed exclusively for one single and specific object, but should be taken to have had a paramount intention to give their money for a general rather than a particular charitable purpose, and to have done no more than graft on to that general gift a preference as to the way in which effect should be given to the general purpose, namely (in the instance under consideration), by establishing a voluntary hospital at Slough, where no hospital existed. But I further expressed (and still hold) the opinion that if the proper conclusion to be drawn from the brochure and document 1, without more, was fairly open to doubt, then it was

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²¹ [1954] 1 W.L.R. 700.

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legitimate, as part of the relevant surrounding circumstances, to have regard to the fact that, as was clearly stated in the brochure itself, subscriptions and donations were being and would be sought through whist drives and other means such that contributors would inevitably part with their money for good and all. The language which I used,²² and which Jenkins L.J. has quoted in his judgment (and particularly my acceptance of the arguments of Mr. Cross and Mr. Buckley), should be read in the context of the supposition which I was making, that is, that, the language of the brochure being equivocal, it was legitimate to assist its construction and effect by the inference to be drawn from the stated circumstance that contributions were being sought at the same time both from persons responding to the brochure appeal by using the form supplied and from persons whom Jenkins L.J. has called anonymous donors.

I did not intend for myself to lay it down (and I do not think it would be right so to do) that the fact of anonymous donations being made and sought contemporaneously would control in favour of a general charitable intention gifts made by name in response to an appeal which, according to its natural and proper interpretation, was an appeal for a single and particular purpose. On the other hand, I cannot for my part accept the view that the fact of contemporaneous anonymous donations must always be irrelevant in determining the intention, general or particular, of named subscribers. As I have observed, the brochure in *Hillier's* case²³ which had to be construed contained an express reference to the collection of anonymous donations. An example was given during the argument in the present case of organizers of an appeal for some charitable object who send to local inhabitants a notice of a pending fête or similar occasion, at which the money collected would inevitably be collected anonymously, and who urge attendance on the occasion. Suppose a recipient, who found himself unable to attend, wrote to the organizers so stating but enclosing a cheque, with a statement to the effect that the amount of the cheque represented what he would have spent at the fête. In such a case there would, to my mind, be, at the least, great force in the contention that the position of such a subscriber should be assimilated to that of those who attended the fête and there contributed anonymously.

In the course of his reply, Mr. Milner Holland referred also to the passage in my judgment²⁴ in which I expressed the view

²² [1954] 1 W.L.R. 700, 713.

²⁴ *Ibid.* 709, 710.

²³ [1954] 1 W.L.R. 700.

that if the contributors of the class under consideration should be treated as subscribing to "the Slough Hospital" as distinct from "the Slough Voluntary Hospital," the conclusion was in favour of a general charitable intention. In the present case, as Mr. Milner Holland observed, the contributions sought were admittedly sought, in effect, for no more or no other than the Ulverston hospital. But in the *Hillier* case²⁵ it was a vital fact that there was no existing hospital at Slough at all: so that the issue and the argument was between the specific and particular object of a *voluntary* hospital at Slough, on the one hand, and a hospital, that is hospital services generally, at Slough—an object not in any case defeated or rendered impossible by the effect of the National Health Service Act, 1946. In the present case there was an old established voluntary hospital at Ulverston and the object of the appeal was, as we conclude, to provide a similar new and enlarged hospital to take the place of the old.

I add, finally, that I confess to having been in the *Hillier* case²⁵ to some extent—and, as I hope, legitimately, if regard is to be had to the realities of the situation—influenced by the circumstances (in marked contrast to the circumstances of the present case) that notwithstanding extensive advertisement no single contributor had come forward who was ready to contend that he had contributed to a single and specific object which had failed, and so was entitled to a return of his money.

Appeal dismissed.

Solicitors: *Solicitor to the Duchy of Lancaster; Hatchett, Jones & Co. for Frank Jackson, Ulverston; Haslewood, Hare, Shirley Woolmer & Co. for Aston, Harwood, San Garde & Green, Manchester.*

E. D.

²⁵ [1954] 1 W.L.R. 700.

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In re MORTON, DECED. MORTON *v.* WARHAM.

Danckwerts J.

[1956 M. 395.]

Hotchpot — Intestacy — Partial intestacy — Life interests brought into account — Method of valuation — Administration of Estates Act, 1925 (15 & 16 Geo. 5, c. 23), ss. 47, 49.

Where on a partial intestacy the benefits received under the will of the testator, which have to be brought into hotchpot by the children or issue of the testator under the provisions of sections 47 and 49 of the Administration of Estates Act, 1925, include life or lesser interests, the method of valuation of such life or lesser interests is the actuarial value of the interest actually taken, and not the capital value of the share settled on such child or issue.

ADJOURNED SUMMONS.

John Morton made his will on February 20, 1924, and died on May 15, 1927. He devised his residuary estate on the usual trust for conversion, and then directed his residuary estate to be held upon trust “(a) to pay the income thereof to my said wife “during her life and after her death (b) to divide my residuary “estate into three equal portions and to pay the income of one “third share to my said daughter Florence Daisy Carter during “her life and from and after her death to pay and divide the “capital of such one third share unto and equally between all “her children. As to another one third share to pay the income “thereof to my said daughter Edith Harriet Hutton during her “life and from and after her death to pay and divide the capital “of such one third share unto and equally between her children. “And as to a further one third share to pay the income of such “one third share to my said son Lewis John Morton during his “life and after his death to pay the income of such one third “share to his children in equal shares and from and after the “death of each child of my said son Lewis John to pay the “capital of the share to which his her or their parent was or “were entitled unto the grandchildren of my said son Lewis “John in equal shares: Provided always that if either of my said “daughters shall die without leaving issue who shall attain a “vested interest under the trusts aforesaid then the share of “the one so dying shall be held in trust for my other daughter “and my said son Lewis John and his issue upon the like “trusts as are hereinbefore declared concerning the original “share of such son and daughter.”

His daughter Florence Daisy Carter died on June 14, 1954, having had one child, who died in 1921 without attaining the age of 21 years and without having ever married. His daughter Edith Harriet Hutton died on April 22, 1954, having had one child, namely, the defendant, Phyllis Morton Fox. The plaintiff, Eric Geoffrey Morton, was the only surviving son of the testator's son Lewis John, who died on February 16, 1933.

As a result, Florence Daisy Carter's share, as to one half, went over to Edith Harriet Hutton and her child, and no difficulty arose as to that; but as regards the other half, which would go over to the share of Lewis John and his child, the plaintiff, Eric Geoffrey Morton, the trusts in favour of grandchildren of Lewis John would fail as infringing the rule against perpetuities; with the result that Lewis John and Eric Geoffrey Morton would take successive life interests and after that the trusts of the accruing share, like the trusts of the original share, would be void under the rule against perpetuities. There was, accordingly, a partial intestacy as to that half share.

The question on the summons relevant to this report was whether, in calculating the amounts to be taken by the testator's children on a partial intestacy each child ought to bring into hotchpot under section 49 of the Administration of Estates Act, 1925¹: (a) the capital value of the share settled on him or her for life, or (b) the value of the interest actually

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¹ Administration of Estates Act, 1925, s. 47 (1): "Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely . . . (iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in

"or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives. . ."

S. 49: "Where any person dies leaving a will effectively disposing of part of his property, this Part of this Act shall have effect as respects the part of his property not so disposed of . . . subject to the following modifications—(a) The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons. . ."

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taken by him or her in the events which happened, or alternatively, actually taken by such child and his or her issue.

Michael Browne for the plaintiff, Eric Geoffrey Morton. The plaintiff is interested in the income of the testator's residuary estate, and it is contended that the interest which has to be brought into hotchpot should be calculated on the value of the interest which, in the events which have happened, he has actually taken.

By section 49 of the Administration of Estates Act, 1925, hotchpot provisions now extend to cases of partial intestacy. Sections 47 and 49 of the Act were considered in *In re Young*² by Harman J., who held that a child of the testator and the issue of that child must bring into hotchpot the whole interest taken by that branch of the testator's family, and not merely the value of the income from the life interest. That case is distinguishable, for there it was held that the whole share, as to capital and income, had to be brought into account. In *In re Gordon*³ the question was the extent of the property which had to be brought into account under the hotchpot provisions contained in the will, and it was held that only life interests were to be taken into account; that case, however, arose under the express provisions of the will.

None of the reported cases is really concerned with this particular question, and the proper interpretation of sections 47 and 49, which are intended to produce equality among a testator's family, would be for each child to bring into hotchpot only what has been actually taken by him, namely, the actuarial value of his interest.

Nigel Warren for the first defendant, Arthur Warham, one of the testator's executors.

D. A. Thomas for the second defendant, Phyllis Morton Fox. It is submitted that the shares should be brought into hotchpot on their capital value, and not as actuarially valued. Support for this contention is to be found in the note to section 47 of the Act in Wolstenholme & Cherry's Conveyancing Statutes, 12th ed., p. 1502, which states that where property is settled, the capital value should be brought in and not merely the value of the life interest given to a child. In *In re Young*⁴ Harman J. said⁵ that

² [1951] Ch. 185; [1950] 2 All E.R. 1040.

³ [1942] Ch. 131; 58 T.L.R. 112; [1942] 1 All E.R. 59.

⁴ [1951] Ch. 185.

⁵ *Ibid.* 188.

so far as section 47 (1) (iii) applied to money or property advanced to a child or settled on him, it was the capital sum which ought to be brought into account. Section 47 was also considered by Clauson J. in *In re Reeve*,⁶ which appears to have been approved by Harman J. in *In re Young*.⁷

Section 49 extends the application of hotchpot provisions to cases of partial intestacy, and the class of persons is enlarged from children to issue, and thus includes grandchildren; but that does not affect the principle of valuation which applies under section 47, since those two sections must be read together; and accordingly the capital value of the interest settled should be brought into hotchpot here.

DANCKWERTS J., having stated the facts, continued: There is, consequently, a partial intestacy, and the question which I have to consider is a tiresome and irritating subject, hotchpot. For some reason, which is difficult to fathom, but presumably with an idea of producing fairness, the draftsmen of the Administration of Estates Act, 1925, introduced hotchpot provisions into the sections of the Act dealing with intestacy. It seems to me that they made a great mistake in so doing, and that it would have been far better to have left the whole thing out. The provisions which I have to apply in the Act are those contained in section 49.

[His Lordship read section 49 of the Administration of Estates Act, 1925, and continued:] I think that is as bad a piece of draftsmanship as one could conceive, in many respects. It says "the requirements." What requirements? I am told the requirements are to be found in section 47 (1) (iii). There one finds certain provisions which are not by themselves particularly apt for application to something else, they are: "Where the property held on the statutory trusts for issue is divisible into shares, then any money or property"—that is, one would suppose, a reference to money or property as a physical or, at any rate, tangible fact and not to an interest in money or property—"which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child . . ." All that is referring to something which is paid or handed over. Then comes a parenthesis which entirely alters the sense in which the words are being used: "(including any life or less interest and including property covenanted to be paid or settled)." In that

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⁶ [1935] Ch. 110.

⁷ [1951] Ch. 185.

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very parenthesis there is a mixture of property in the sense of some actual thing and property in the sense of some interest in some thing. The "life or less interest" must, of course, refer to an interest in property, and not property itself; but there it appears, mixed up in the same parenthesis, "shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives. . . ."

If those two sections of the Administration of Estates Act, 1925, apply to this case, whatever is taken by the persons taking on intestacy, being issue of the deceased, under the will of the deceased has to be brought into account, it would appear. The provisions of section 49 are much more general in certain respects than those of section 47. Section 47 is confined, in the clause which I have read, to children; but it seems plain that section 49 (a) applies to issue of any degree, and it applies apparently to any beneficial interest acquired by any issue of the deceased under the will of the deceased. Consequently, the result of that appears to be that people who take in the present case under the partial intestacy of John Morton have got to bring into account, against any shares which they take in that way, the beneficial interests of any kind which they take under the provisions of the will; and it seems plain, if section 47 is to be read as part of section 49 (which, I suppose, it has), that one has got to include something less than an absolute interest, because one has got to include "any life or less interest." Consequently, it seems to me that the life interest taken by those who do not take an absolute interest under the will should be accounted for under section 49 in a division of the testator's estate on intestacy.

The question is: how are those life interests or lesser interests, if there be any, to be dealt with? I have been referred to certain cases, *In re Young*,¹ in which Harman J. treated the share of the whole stirps as being equivalent to a gift of the capital of the interest in which they had successive interests, and directed that the whole capital be brought into that stirps in that manner, and *In re Gordon*,² a case before Uthwatt J., where life interests had

¹ [1951] Ch. 185; [1950] 2 All E.R. 1040.

² [1942] Ch. 131; 58 T.L.R. 112; [1942] 1 All E.R. 59.

to be brought in under the provisions of an express provision for hotchpot, which was to that extent, of course, a different case from the present. I have also been referred to *In re Reeve*,³ a decision of Clauson J., which does not really deal very relevantly with the matter in consideration in the present case.

It seems to me, reading section 47 with such application as I can give to it, that the life interests or less interests which are brought in at a valuation, must be brought in at a valuation appropriate to the nature of the interest—and that seems to me to require that the life interest should be valued according to the relevant actuarial considerations; and they cannot be brought in as if they were equivalent to an absolute interest in the capital. To value the interest as being equivalent to a gift of capital in a case where a person takes no more than a life interest seems to me contrary to fairness, common sense and everything else. Accordingly, I so hold.

I will declare that in calculating the amounts to be taken by the testator's children on a partial intestacy each child ought to bring into hotchpot the value of the interest actually taken by such child or his or her issue.

Declaration accordingly.

Solicitors: *Gibson & Weldon for L. Powell, Kendal; Beardall, Fenton & Co.; Denton, Hall & Burgin for Charles G. Lester & Russell, Bournemouth.*

I. G. R. M.

³ [1935] Ch. 110.

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